

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

vs.

B. W. ALEXANDER, et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 495 to 664

FILED

JUN 11 1942

PAUL P. O'BRIEN,

CLERK

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United States for the District of Montana.

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Upon Appeals from the District Court of the
United States for the District of Montana.

JOHN McDONALD

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name Mr. McDonald?

A. John McDonald.

Q. How old are you? A. Forty-nine.

Q. And what was your father's name?

A. Joe McDonald.

Q. And was your father the same Joe McDonald, the one who has been referred to here as the builder of the McDonald-Deschamps Ditch?

A. Yes sir.

Q. Now who is Duncan McDonald?

A. He is my brother.

Q. Do you know where his allotment is located?

A. Yes it is up there, the Alexander place.

Q. Is that the place that is now owned by Mr. Alexander? A. Yes sir.

Q. Do you recall when this ditch was constructed by Mr. Sanders and Mr. Turnidge? A. Yes.

Q. Where were you living at that time?

A. Down on Post Creek.

Q. With your parents? A. Yes.

Q. Now do you know when this ditch was finished or continued or extended from the place where Mr. Sanders stopped until it [341] went on the land of these——

(Testimony of John McDonald.)

A. —The next year.

Q. Johnny, in the year 1904, what was your father doing?

A. Well he was running a lot of cattle at that time, and in the cattle business, and putting up a lot of hay.

Q. And whereabouts on the Reservation was he running his cattle?

A. Well we run them all over, around Pablo, now, and in that country, and in the Mission, was all open country then.

Q. Well did he have any land fenced up?

A. Yes.

Q. Well where were those lands?

A. Well we had a big bunch of land on Post Creek fenced, and we had a big bunch up there where these people is now—it was, oh I guess he must have had 1500 acres fenced in there.

Q. And was the land that he had in fence up on Post Creek, did that include the lands that are now owned by the defendants in this action?

A. Yes some of them.

Q. You are acquainted with Mr. Alexander's land are you? A. Yes.

Q. And Mr. Knutson's? A. Yes sir.

Q. And Mr. Hazel's? A. Yes sir.

Q. And Mr. Stevens's? A. Yes sir.

Q. And do you know where Tom Wald's land is? A. Yes sir.

(Testimony of John McDonald.)

Q. And Mr. Minesinger's land? [342]

A. Yes sir.

Q. Now what parts of those lands were included within this fence job that your dad had?

A. Well he had Knutson's place, now, and Mr. Hazel's and Mr. Alexander's, and he had a lot of other land—it was in one fence there, you see; they said you could go out and fence the whole place up; that was before the allotting.

Q. Well what did he raise, stock, on this land?

A. Yes sir.

Q. Did he farm or cut any hay on this land?

A. Yes sir.

Q. Who is Florence McDonald?

A. She is my sister.

Q. And she has a place up there?

A. Yes sir.

Q. You are acquainted with her allotment?

A. Yes sir.

Q. Who owns that land now, do you know?

A. Mr. Hazel.

Q. Now going back to 1904 and 1905, up to 1909, I will ask you if you know whether your father raised any hay on the Florence allotment?

A. Yes sir he did.

Q. Can you tell the Court, Johnny, whether he used any irrigation water on that allotment during the years 1905 to 1909? A. Yes he did.

Q. What did he raise on that allotment?

(Testimony of John McDonald.)

A. Well he was raising hay and some grain.

Q. Was this hay tame hay or wild hay?

A. It was a kind of a wild hay. [343]

Q. Did he harvest that hay? A. Oh yes.

Q. For his stock? A. Yes.

Q. Now who is Mary C. McDonald?

A. She is my sister.

Q. Can you tell the Court, Johnny—going back to Florence's allotment—about how many acres of Florence's allotment was irrigated?

A. Well that's a tough kind of a—it has been so long ago it is kind of a hard question for me to answer—but there was several acres that was irrigated.

Q. Now you say Mary C. McDonald is your sister? A. Yes.

Q. And was her land within the fence that your dad had? A. Yes.

Q. These allotments of course were made, were they not, later?

A. Yes they were made later.

Q. Now tell the Court whether or not your father raised any crops or hay on Mary's allotment? A. Yes he did.

Q. And did he use any water to irrigate that allotment with?

A. Yes he used—yes he used some water on it.

Q. What did he raise on Mary's allotment, mostly hay and grain?

(Testimony of John McDonald.)

A. Well he raised hay and some grain and there was a pasture.

Q. Did your father use water for irrigating the pasture too?

A. Well yes, yes he—you see we had a man working for us about two years, a Mr. John Lewellen and he was pretty familiar with irrigating and he done all the irrigating out there. [344]

Q. Where is Mr. Lewellen now, do you know.

A. The last I heard of him he was in California.

Q. Did your father have some other men up there irrigating before Mr. Lewellen went to work for him?

A. Well now that's—I couldn't—that is a kind of a hard——

Q. ——Well let me ask you if you remember a man by the name of Marcure? A. Yes.

Q. What was his first name? A. Pete.

Q. Pete Marcure? A. Yes.

Q. Did he ever work for your father?

A. Yes.

Q. And did he work on some of these allotments? A. Yes sir he did.

Q. Did he work up there before Mr. Lewellen did? A. Yes I think he did.

Q. Would you say that Marcure and Lewellen both worked there for your father between the years 1905 and 1909?

A. Yes I think so—yes they did—that is. they didn't work all the time.

(Testimony of John McDonald.)

Q. I didn't mean that—but between those years they were working there for your father?

A. Yes.

Q. Did Marcure do any irrigating?

A. Yes he did.

Q. Do you recall how long he worked?

A. Well he just worked one summer there for us.

Q. And how many summers did Lewellen work?

[345]

A. He worked for us about two—either two or three years—it has been so long—and he worked for us.

Q. Well who was Frank Fiddler?

A. Well Frank Fiddler was an adopted son of Ed Deschamps.

Q. Were you acquainted with Ed Deschamps?

A. Yes, well acquainted with him.

Q. Is he living now?

A. No he is dead.

Q. Frank Fiddler was his adopted son?

A. Yes.

Q. Do you know whether or not he was allotted up in that vicinity?

A. Yes he was allotted up there.

Q. Was the land that was afterwards allotted to him under this fence of your father's?

A. Well I think there was some of it was, a corner of it was under his fence.

(Testimony of John McDonald.)

Q. Do you know whether or not your father, prior to 1909, irrigated any of Frank Fiddler's place? A. Who, my father?

Q. Yes. A. No.

Q. Your father irrigated some of Mary's place, you stated?

A. Yes he irrigated on Mary's and Florence's and then on Duncan's and then Louie Head's place.

Q. He irrigated Duncan's allotment?

A. Yes Duncan's and Louie Head's place.

Q. And Mary's allotment? A. Yes.

Q. And Florence's? [346] A. Yes.

Q. And Louie Head's place?

A. Well not all of Louie Head's—there was a corner of it in there.

Q. Well Louie Head's place is located just south—— A. ——South of Alexander's.

Q. Well who was or is William Deschamps?

A. Well he was a brother of Ed Deschamps; he was my mother's brother.

Q. Oh he is then, he is your uncle?

A. Yes.

Q. Was he allotted some land up in that country?

A. Yes, he is where Mr. Stevens—Avery Stevens—has got his place.

Q. Was that land within the fence that your father had up there?

A. No, there was a line fence in there but after

(Testimony of John McDonald.)

they allotted it then they put the fence on the line, and he had a fence across there.

Q. Do you know whether or not there was any of the William Deschamps allotment irrigated?

A. Yes I remember when they irrigated some over there.

Q. Can you say approximately how much, Mr. McDonald, if you remember?

A. No I don't, but I know there was irrigation on there.

Q. What did he raise, hay or grain, or what?

A. Well they raised hay and grain, yes.

Q. Now Edward Deschamps, who was he?

A. Well he was one of my uncles too.

Q. He was a brother of William? [347]

A. Yes.

Q. And the son of Joe Deschamps?

A. Yes.

Q. Was he allotted on there? A. Yes.

Q. And did your father have his land within his fence, do you remember?

A. No I don't know—no we didn't have none of his, not at that time.

Q. You don't know whether your father raised any hay on Edward Deschamps' place or not?

A. No.

Q. Did Joe Deschamps farm William Deschamps' allotment? A. Yes he did.

Q. And do you know whether or not he used any irrigation water on William Deschamps' place?

(Testimony of John McDonald.)

A. Yes he did.

Q. For what purpose?

A. Well it was some hay and grain.

Q. And would you be able to tell the Court now how much you recall of the William Deschamps place that was irrigated during those three or four years?

A. No I couldn't, it is kind of hard for me.

Q. Well what about the Edward Deschamps allotment, did Joe Deschamps farm that?

A. No he didn't farm that, Ed Deschamps farmed it himself.

Q. Did he raise any hay on it?

A. Yes he raised hay and grain.

Q. Did he have any stock? Did he own any stock?

A. Yes he had stock. [348]

Q. Did Joe Deschamps have stock?

A. Yes.

Q. Now can you tell us whether Ed, in farming his place, used any water to irrigate his place?

A. Yes he used some water.

Q. The Deschamps are all of Indian blood, aren't they?

A. Yes.

Q. You are a member of the Flathead Tribe yourself?

A. Yes sir.

Q. And your father?

A. Yes sir.

Q. Now Oro Deschamps, who was he, or is he, Johnny?

(Testimony of John McDonald.)

A. Well she was Ed Deschamps wife, she was a white woman—she was adopted later by the tribe.

Q. Is she living now or dead?

A. No I think she is dead.

Q. And was she allotted some land up in that country? A. Yes she was allotted.

Q. Do you know whether her land was farmed or not during the years 1905 to 1909?

A. Yes that was farmed, Ed Deschamps farmed that.

Q. Can you tell the Court whether or not he used any water on that land?

A. Yes I remember when he used some water down there.

Q. I believe you stated that all of these Deschamps that we have been talking about were and are Indians, Johnny? A. Yes.

Q. All of them members of the Flathead Tribe?

A. Yes they are all members of the Flathead Tribe.

Q. Well are you acquainted with John Minesinger? [349]

A. Yes I am well acquainted with him.

Q. How long have you known him?

A. Oh I have knowed John ever since I was a boy.

Q. And are you acquainted with Andy Magee?

A. Yes, well acquainted with him.

Q. Is he—do you remember whether or not they built a ditch?

(Testimony of John McDonald.)

A. Yes I remember when they built their ditch.

Q. And are you familiar with the approximate location of the Magee-Minesinger Ditch now?

A. Yes, that is, I know of it, I have been by it several times and know where it comes out of the creek.

Q. I believe you said that you were living on Post Creek in 1904 when the McDonald-Deschamps Ditch was dug, didn't you? A. Yes.

Q. You were living down near the old Fort?

A. Well just above the old Fort, about a half mile above the old Fort.

Q. What fort was that—what was the name of that Fort? A. Fort Konah.

Q. Fort Connah, wasn't it? A. I think so.

Q. Did you afterwards, or your father and your family afterwards move up on to some of these allotments?

A. Yes we moved up there—you mean up on the Alexander place?

Q. Yes, up in that vicinity?

A. Yes we moved up there.

Q. About when did you move up there, do you know? [350]

A. Well you see we was back and forth; I remember when we moved up there, we got up there in the summer time and we then lived in a tent up there one summer while they were doing some work up there, and——

(Testimony of John McDonald.)

Q. Was that before 1909? A. Yes.

Q. Whereabouts were you living when you were living in the tent?

A. We was living right down where Mr. Hazel's house is now, or just south of Mr. Hazel's house there.

Q. And was that on some of this land that is now involved in this law suit?

A. Yes he put in an orchard there where Mr. Hazel's house is now.

Q. And you lived up there in the summer?

A. Yes for a few years and then we moved—when we got through haying we moved up there and we stayed there—it was in 1908 that we moved right up there and stayed there then.

Q. In 1908? A. Yes.

Q. Built a house?

A. Yes we had a house, Mr. Magee he built the log house where we were.

Q. Johnny will you tell the Court, these allotments there that were made to you Indians by the government, were they picked out by you and your father and your sister and brother? A. Yes.

Q. Before the allotments were actually made?

A. Yes they were, yes, my father picked them out.

Q. He picked out one for himself? [351]

A. No he picked them out for my brothers and sisters.

(Testimony of John McDonald.)

Q. Did he select an allotment for himself also?

A. No he didn't, his own allotment was in Idaho.

Q. Oh, it was just your mother and you two children? A. Yes.

Q. That were allotted on this reservation?

A. Yes.

Q. And your father picked out those allotments for you before the allotments were actually given to you by the government? A. Yes.

Q. How long after you moved up there in 1908 did you folks live up there?

A. Well we—I lived up there about—now I—it is kind of hard for me, but we—

Q. —Well just approximately?

A. We must have lived up there five or six years; then my father rented the place, that is, there was a couple of fellows from Spokane, the Sturgis brothers, they had a homestead in the Moiese Valley, they homesteaded there in 1910, and then they moved up from Moiese and they stayed on that place up there and they farmed it; that is, they was on the place that is Mr. Hazel's place now, and Mr. Knutson's and Duncan's place, and they farmed there and they were there I suppose two or three years.

Q. During the time you folks were living up there with your dad did you raise some crops on it?

A. Yes.

(Testimony of John McDonald.)

Q. Were those just small crops or were they big crops?

A. Oh they were just medium sized crops. [352]

Q. Raised some wheat?

A. Yes we raised some; I ploughed, myself, up there.

Q. Oats? A. Oats and wheat, yes.

Q. Ever take any of that wheat down to the mill at the——

A. ——Yes sir we hauled some of it clean to Ravalli, with wagons, up there.

Q. Did you have any ground at the Fathers' mill at the Mission?

A. I think we did, yes.

Q. Did you tell me recently, Mr. McDonald, that you could go up there and now find a lot of old ditches that you folks had that are not being used now?

A. Yes, right to that Louie Head place.

Q. What about the Alexander place?

A. Well to that place too—well I don't say now—it has been ploughed up—but there is one ditch there, I know, my father made, dug through the middle of the Alexander place—it flows on to the Louie Head place.

Q. Did you see them take water down to the Louie Head allotment? A. Yes they did.

Q. That is just below the Alexander place?

A. Yes.

Q. Did you raise crops on that place?

(Testimony of John McDonald.)

A. Yes we raised crops and raised a little hay on there.

Q. And irrigated it?

A. That is—now I went a little too fast there—but we raised hay where this—just—you see the ditch comes to one corner there—there was an old cabin in there and a hay [353] meadow in there—well we irrigated that and raised hay, and then above, just dry land, we raised grain there.

Q. You did use some water on the Louie Head allotment?

A. Yes we irrigated a meadow there.

Q. On the Louie Head allotment?

A. Yes.

Cross Examination

By Mr. Simmons:

Q. The hay you referred to on the Head allotment was not irrigated, it was a dry farm?

A. Some of it was dry farmed, the same as this Alexander place, well he has got some of the same ground we farmed that he dry farms now.

Cross Examination

By Mr. Smith:

Q. Who owns the Louie Head place now?

A. Well my father owns it.

Q. He owns it now?

A. Yes; this Louie Head lived with me when he was a boy, he lived with us too, and he stayed right with us all the time, and he died, I think, about

(Testimony of John McDonald.)

seven or eight years ago, and he willed his farm to my dad later.

Q. Is your dad farming that place now?

A. No.

Q. Who is farming it?

A. There ain't nobody farming it.

Witness Excused.

Whereupon at 5:00 o'clock p. m. of said day adjournment was had until 10:00 o'clock the following morning, May 8, [354] 1940, when the trial was resumed.

Mr. Wallace: May it please the Court, may I recall Charles Sanders for a few questions?

The Court: Very well.

CHARLES SANDERS,

witness for the defendants, was recalled and testified as follows:

Direct Examination

(continued)

By Mr. Wallace:

Q. Mr. Sanders during the time that you were constructing the McDonald-Deschamps Ditch did you do any trading with the merchants on the reservation? A. Yes sir.

(Testimony of Charles Sanders.)

Q. With whom? A. George Beckwith.

Q. And where was Mr. Beckwith located at that time?

A. Well he was located—well it was in an old log cabin close to the store that stands there now.

Q. And that was in what is now Saint Ignatius?

A. Yes sir.

Q. And near the Catholic Mission?

A. Yes.

Q. And you purchased your supplies from him?

A. Yes sir.

Q. And did you have an account with him at that time? A. Yes sir.

Q. And was that the only time you ran an account there? A. Yes sir. [355]

Mr. Simmons: No cross examination.

Witness Excused.

ANDY MAGEE

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name is Andy Magee?

A. Yes sir.

Q. Are you the Mr. Magee after whom the Magee-Minesinger Ditch is named or called?

(Testimony of Andy Magee.)

A. Yes sir.

Q. When did you go on the reservation first,
Mr. Magee? A. First?

Q. Yes, what year? A. 1888.

Q. Did you leave the reservation?

A. Yes I left it.

Q. And then when did you go back?

A. I went back again in 1906.

Q. Were you a married man in 1906?

A. Yes sir.

Q. Was your wife a member of the Flathead
Tribe of Indians? A. She was.

Q. Was her name Emma Magee?

A. Yes sir.

Q. Who is James Waymack?

A. That is my stepson. [356]

Q. Now in 1906 where did you go to, upon the
reservation?

A. I went down there looking around these allotments, and I went to Post Creek and located the place which I sold to Mr. Wald in later years.

Q. And what year did you locate on that piece
of land? A. In 1906.

Q. And was that piece of land the same piece
of land that was afterwards allotted to your wife?

A. Yes sir.

Q. And did you construct any buildings on that
allotment?

A. I built a little house and little barn.

Q. And when did you do that?

(Testimony of Andy Magee.)

A. I built them in the fall of 1906 and I wintered there that winter.

Q. And your stepson Waymack lived there with you?

A. No he didn't, not at that time.

Q. Did he later?

A. Well no, he come and stayed there a while, and then he went to school, to Oregon.

Q. Did you select an allotment for him?

A. I picked it for him.

Q. And was that before it was actually allotted to him?

A. No it wasn't allotted at the time I picked it.

Q. It was afterwards allotted to him?

A. Yes sir.

Q. And did you fence your wife's allotment?

A. I did.

Q. When?

A. I fenced it the spring of 1907.

Q. And what about the James Waymack allotment? [357]

A. I fenced it the same time.

Q. Did you farm those two pieces of land?

A. I did.

Q. When did you commence farming them?

A. I began farming them in 1907.

Q. Now did you help construct the Magee-Minesinger Ditch? A. I did.

Q. And where did you take that from—what creek did you take that ditch out of?

(Testimony of Andy Magee.)

A. Post Creek?

Q. And out of McDonald Lake?

A. A little ways below the outlet of McDonald Lake—just below the McDonald and Deschamps Ditch.

Q. Who helped you build that ditch?

A. George Buckhouse.

Q. And is it sometimes referred to as the Magee-Minesinger Ditch?

A. Well you will have to ask somebody else, I don't know.

Q. Well did Minesinger use that ditch?

A. Well Buckhouse had Minesinger's land on an improvement plan; he was to fence it and build a house and help put in that ditch.

Q. And when did you build that ditch?

A. In the spring of 1907.

Q. And George Buckhouse helped you?

A. George Buckhouse helped me.

Q. Is that the same ditch that he helped you dig in the spring of 1907, is that the ditch that is now being used and known as the Magee-Minesinger Ditch?

A. It is. [358]

Q. How much land—do you know how much land Mr. Buckhouse was farming then?

A. Buckhouse was farming 160 acres.

Q. And that was the Minesinger land?

A. Yes.

Q. Well what did you build this ditch for?

A. To get water to irrigate with.

(Testimony of Andy Magee.)

Q. Why did you need water to irrigate with?

A. Well I just considered that if I didn't have water—well if I had water and lots—plenty of it, I would naturally have no crop failures, and if I didn't have, why it is a gamble and you don't know whether you are going to have anything or not.

Q. When did you first use water for irrigation purposes? A. In 1907.

Q. On your wife's allotment? A. Yes sir.

Q. Did you use any water for irrigation on the Waymack allotment? A. Yes sir.

Q. In 1907? A. Yes sir.

Q. Will you tell the Court, Mr. Magee, approximately how much—what part—how many acres of your wife's allotment you broke up in 1907?

A. About 40 acres.

Q. Did you break up any on the Waymack allotment? A. No I didn't.

Q. How many of those 40 acres did you irrigate in 1907? What part of the 40 acres that you broke up did you irrigate [359] in 1907?

A. It was the north end.

Q. North part? A. North forty.

Q. How many acres did you irrigate?

A. About forty.

Q. Did you afterwards break up some more of your wife's allotment?

A. Broke it all up.

Q. When did you break up the balance of your wife's allotment?

(Testimony of Andy Magee.)

A. I broke that up in the fall of 1907.

Q. And when did you break up the Waymack place?

A. Well I broke that up at different times, and what I didn't plough, well I used it for pasture; I had quite a few stock.

Q. Well when you got your wife's allotment entirely ploughed up did you apply water for irrigation to the whole of it? A. Yes.

Q. And is that true also with reference to the Waymack allotment?

A. Sure, and I irrigated Waymack's before I ploughed it, and for a hay pasture too.

Q. How much, then, of your wife's allotment did you irrigate? A. All of it.

Q. And how much of the Waymack allotment did you irrigate?

A. Well it was a little corner in the southeast that I couldn't get on to without going up into the allotment of Joe [360] Turnage; on account of a little dip in the ground I would have to go on his place, and that I let go.

Q. About how many acres in that little corner?

A. Oh three or four, I don't know, it was a three-cornered patch.

Q. How much of the balance of the Waymack allotment did you irrigate?

A. I irrigated the rest of it.

Q. Now then how long did you continue to occupy these two pieces of land? A. Until 1917.

(Testimony of Andy Magee.)

Q. And during all of the years from 1907 to 1917 did you use water from this ditch for irrigation?

A. I sure did.

Q. On both of these allotments?

A. Both of them pastures.

Cross Examination

By Mr. Simmons:

Q. Mr. Magee, referring to Plaintiff's Exhibit 8, which is a—contains the so-called Secretarial rights to your wife's allotment and to the James Waymack allotment, I will ask you if you are familiar with the grants made by the Secretary?

A. No sir I wasn't.

Q. You were aware of the fact that those lands were granted private water rights, certain acreage on those lands, by the Secretary of the Interior?

A. I wasn't.

Mr. Simmons: I call the Court's attention to the Plaintiff's Exhibit 8, wherein the Emma Magee allotment—

Q. —That was your wife's allotment? [361]

A. Yes sir.

Mr. Simmons: —was granted a full water right by the Secretary of the Interior to an acre on that allotment.

Q. And on the James Waymack allotment you state that you irrigated or that there was irrigated in 1907 all but three acres—or four acres?

A. No I didn't state that.

(Testimony of Andy Magee.)

Q. What did you state? A. In 1907.

Q. What year was it, Mr. Magee?

A. He asked me how much I irrigated while I had it and I said practically all but that three or four acre corner piece, in the southeast corner.

Q. How many acres would you say you irrigated?

A. Well just as a general proposition it was a three-cornered piece, and I didn't measure it; I just cut it off because I would have to go up on another man's piece of land to get my ditch on it, but I should judge there was between three and four acres, maybe five acres, and I don't think more than that.

Q. That you irrigated or didn't irrigate?

A. That I didn't irrigate because I couldn't get water on it.

Q. And do you know how many acres there was in the allotment?

A. The entire field was supposed to be 80 acres but I had to give the county 30 feet on the west and 30 feet on the south.

Q. That was the James Waymack allotment?

A. Yes sir, for roads.

Mr. Simmons: For the Court's information I wish to refer again to Plaintiff's Exhibit 8, containing a Secretarial [362] grant to the James Waymack allotment number 689, in which the Secretary recognized a grant or right to 52.3 acres on the James Waymack allotment number 689.

(Testimony of Andy Magee.)

The Court: What is the allotment, how many acres?

Mr. Simmons: To 80 acres.

Q. I wish to refer to Plaintiff's Exhibit number 10, Mr. Magee, and I will ask you if you know that from October 30, 1914 to November 30, 1914, certain engineers of the United States Reclamation Service made a transit stadia survey of the lands of James Waymack—that is, if you know certain engineers were on there and surveyed?

A. I know there were engineers that were around there all the time; you could see one in sight pretty nearly any time.

Q. You have never seen the report?

A. But I don't know who they were.

Q. I wish to refer you to this—that portion of Plaintiff's Exhibit 10 which contains the survey made by R. W. Lincoln, a junior engineer of the United States Reclamation Service, between October 30, 1914 and November 30, 1914. The report, Mr. Magee, shows that on this allotment there was unirrigated on the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 17, Township 19 North, Range 19 West, 39.9 acres?

A. That was?

Q. That was not irrigated?

A. On the NW $\frac{1}{4}$?

Q. On the NW $\frac{1}{4}$?

A. On the NW $\frac{1}{4}$ —well the engineer that put that on there, there was something the matter with

(Testimony of Andy Magee.)

his head, because I'll tell you, that was one of the first pieces on the Waymack place that I irrigated.

[363]

Q. And then on the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 17, Township 19 North, Range 19 West, he shows 39.7 acres not irrigated?

A. Well I didn't irrigate any then, hardly, did I?

The Court: All right, the district, I think, has testified there were.

Mr. Simmons: Well if the Court please, they were allowed per acre—referring to the Plaintiff's Exhibit number 8, the James Waymack allotment, the grant shows "that said 52.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek," which is based upon testimony and upon the stadia survey made by the engineer, even though it shows it was unirrigated, it possibly may have been used for pasture.

The Court: Well they may have irrigated pasture, may they not?

Mr. Simmons: That is very true, but I will call Mr. Sperry——

The Court: —Well the Secretary had authority to do what he did; is the government now in position to question him?

Mr. Simmons: We are not questioning the authority.

The Court: You are questioning the right, in this case——

(Testimony of Andy Magee.)

Mr. Simmons: —Probably Mr. Sperry can clear this up when he can take the stand.

The Court: Well you are the lawyer and he is the engineer; I am asking you whether in this case you question the right——

Mr. Simmons: —We are not questioning the right of the Secretary—— [364]

The Court: —To irrigate 52.3 acres.

Mr. Simmons: Not at all, your Honor, we are merely showing by this proof that the Secretary recognized more than was actually irrigated, gave a right to more land than was actually irrigated, according to the report of the engineer made in 1914. Now, if the Court please, this report was made in 1914; the testimony of the witnesses at the hearings held may have been to the effect that these lands were irrigated prior to 1914, when the stadia survey was made, which would have given the Secretary reason enough to have recognized that right.

The Court: Well the testimony of the witness is that he began breaking up on the Magee allotment in 1907; that he irrigated 40 acres that year, and the following year he broke the remainder and irrigated all of it. The testimony of the witness is that at a little later date he broke the entire Waymack allotment with the exception of three or four acres in the southeast corner.

The Witness: Well I broke that too but I didn't irrigate it.

(Testimony of Andy Magee.)

Mr. Simmons: Well the Secretary—we are not contesting the right at all, that the Secretary granted to the Emma M. Magee allotment or to any of these allotments; for that matter, the Secretary granted a full right to the Emma M. Magee allotment.

The Court: The question is whether we shall believe the testimony of a living witness on the stand or take the report of the junior engineer; candidly, I would rather have the testimony of the living witness than the junior engineer, if the living witness is of the right type. [365]

Mr. Simmons: I can refer to this same report on Exhibit 10, on the Emma Magee allotment, and the stadia investigation between October 30, 1914 and November 30, 1914, on the Emma Magee allotment, which shows that there was possibly irrigated on the NE $\frac{1}{4}$ 40 acres and on the SE $\frac{1}{4}$ 20 acres, and the Secretary granted a right to the full 80 acres, showing that certainly from the testimony there was undoubtedly pasture used on those two allotments or some irrigation done.

The Court: Any further cross.

Mr. Simmons: No further.

Cross Examination

By Mr. Smith:

Q. Do you know what time the various portions of the Waymack allotment were brought under irrigation?

(Testimony of Andy Magee.)

A. Just as I got time—you mean brought under irrigation?

Q. Yes.

A. Oh it was brought under irrigation in 1907 and 1908.

Q. That is, a part of it was it not—you irrigated a part of the Waymack allotment, in 1907 and 1908?

A. Well in fact I irrigated all that could be irrigated.

Q. You mean that in 1907 and 1908 you irrigated all but three or four acres?

A. But I wasn't farming it all because I had quite a little stock and I thought that they would sooner eat green grass than dry grass.

Q. So that in 1907 and 1908, if I understand you correctly, you farmed a part of the Waymack allotment and used the remainder of it for pasture?

A. Yes sir.

Q. And at that time irrigated all but three or four acres? [366]

A. Yes sir.

Q. In the southeast corner? A. Yes sir.

Q. Is that right? A. Yes sir.

Witness Excused.

GEORGE BUCKHOUSE

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. What is your name?

A. George Buckhouse.

Q. And where do you live?

A. Saint Ignatius, Montana.

Q. And that is on the former Flathead Indian Reservation? A. Yes sir.

Q. What is your business up there now?

A. Butcher business.

Q. When did you first go up on the Flathead Reservation? A. In 1906.

Q. And what work or occupation did you follow or then enter upon?

A. Well I done some threshing first.

Q. What?

A. Run the threshing machine when I first went there.

Q. Did you later settle on the Minesinger land?

A. I did. [367]

Q. Are you acquainted with John Minesinger?

A. I am.

Q. And his wife Ada—is it? A. Julia.

Q. You are acquainted with Mr. Magee—Andy Magee? A. I am.

Q. Where were the Minesingers living when you went up on the reservation in 1906?

(Testimony of George Buckhouse.)

A. They were living in Missoula.

Q. Had they at that time selected any land?

A. Yes they had.

Q. And is that the same land that was afterwards allotted to John Minesinger and Julia Minesinger?

A. That's right.

Q. Well did you afterwards farm that land?

A. I did.

Q. Well when did you enter upon that land for the purpose of farming it?

A. 1907.

Q. About what time?

A. Oh I imagine about the first of March.

Q. Did you rent that land?

A. I did.

Q. From the Minesingers or from the government?

A. From the government and the Minesingers too.

Q. Well did you help Mr. Magee construct what is now known as the Magee-Minesinger Ditch?

A. I did.

Q. And was that the same ditch that you and he built and that the same ditch that is now in use and known as the Magee- [368] Minesinger Ditch?

A. It was.

Q. Can you tell the Court what year that ditch was built?

A. It was built in 1907.

Q. And the purpose of it was for what?

A. Irrigating the Minesinger allotments and the Magee allotments.

(Testimony of George Buckhouse.)

Q. And did you actually use the water from that ditch to irrigate the Minesinger land?

A. I did.

Q. Had any of this land been broken up?

A. Had any of it, you say?

Q. Yes. A. Yes it had.

Q. And was it all broken up, or did you break it?
A. I broke it up, all of it.

Q. And that was when?

A. In 1907—I didn't break it all up in 1907.

Q. Well how much of the John Minesinger allotment did you break up in 1907?

A. I imagine about 60 acres.

Q. And did you use water on it from this ditch?

A. I did.

Q. On that allotment? A. I did.

Q. In 1907? A. Yes sir.

Q. For farming purposes or pasture purposes?

A. Both.

Q. Will you tell the Court how many acres of the John [369] Minesinger allotment you irrigated in 1907?

A. Well I imagine around about 60 acres.

Q. How long did you occupy those lands?

A. Four years.

Q. And did you later put any more of the John Minesinger allotment under irrigation?

A. I did.

Q. What year? A. 1908.

(Testimony of George Buckhouse.)

Q. At the end of 1908 how much of this allotment did you have under irrigation?

A. The Minesinger—John Minesinger allotment?

Q. Yes.

A. The two allotments or the one?

Q. The John Minesinger allotment?

A. Well I put all of it.

Q. Well you know the John Minesinger allotment do you not?

A. Well I couldn't be sure just which allotment it is—I had the two of them together.

Q. Julia's and John's. Well how many acres of the Julia Minesinger allotment did you put under—

A. —Well I had both allotments under irrigation.

Q. Well at the end of 1908 then, how much of both of the allotments did you have under irrigation?

A. Well practically all of it but maybe three acres.

Q. Might I suggest to you, Mr. Buckhouse, that the John Minesinger allotment is described as the $S\frac{1}{2}$ of the $NW\frac{1}{4}$ and the Julia Minesinger is described as the $N\frac{1}{2}$ of the $NW\frac{1}{4}$, of Section 17?

A. Yes. [370]

Q. Julia's lays to the north and John's to the south; and so you say that you had practically all of those two allotments under water? A. I did.

Q. For farming and pasture purposes?

(Testimony of George Buckhouse.)

A. Yes sir.

Q. And did you continue to use water on both of those allotments during the remainder of the four years that you were there? A. I did.

Q. Now when you were there on that allotment did you dig a well? A. I did.

Q. On which allotment?

A. On the Julia Minesinger allotment.

Q. Tell the Court what character of soil you ran into where you dug this well; was it gravel or clay or black soil?

A. Well part of it—different layers—some of clay, some black dirt and some sand and gravel.

Q. Is there any gravel on this Julia allotment?

A. Well there are places there is, yes.

Q. Do you know whether or not there is a streak of gravel that runs down through the Minesinger allotment and into the Emma Magee allotment?

A. There is, yes.

Q. And is that gravel quite near the surface of the ground? A. Yes it is.

Q. Can you tell the Court, or do you know approximately how many acres of this John Minesinger allotment has gravel?

A. Well I imagine there is around about 20 acres of it.

Q. Are you able to state approximately how many acres on the [371] Emma Magee allotment has gravel on it? A. The Emma Magee?

(Testimony of George Buckhouse.)

Q. If you know—I'm asking you if you know?

A. I imagine there is about 30 acres of it.

Q. And is that the same streak of gravel that runs down through those lands? A. It is.

Cross Examination

By Mr. Simmons:

Q. You know, Mr. Buckhouse, that the Secretary of the Interior granted a right to—so-called private Secretarial right—to 75.4 acres on the John Minesinger allotment? A. I do not.

Q. Did you appear before the committee at the time the investigation was made? A. I did.

Q. You never knew the findings of the committee? A. No.

Q. And on the Julia Minesinger allotment to 77.4 acres?

A. I don't know how much was allotted.

Q. You stated that practically all of the lands on these allotments were irrigated; were there a few acres that were not irrigated? A. There were.

Q. And these findings of the Secretary would probably represent the approximate acreage actually irrigated? A. I imagine.

Redirect Examination

By Mr. Wallace:

Mr. Wallace: I overlooked a few questions I would like [372] to ask the witness, if your Honor please.

(Testimony of George Buckhouse.)

The Court: Very well.

Q. Were you acquainted with Joe McDonald and Deschamps? A. I were.

Q. At that time? A. I were.

Q. Do you know whether or not the McDonald-Deschamps Ditch had already been constructed when you——

A. —It had been.

Q. Of course you were acquainted with the land that was afterwards allotted to William Deschamps?

A. I was.

Q. And Ed Deschamps? A. Yes sir.

Q. And the land that was also allotted afterwards to Frank Fiddler? A. I was.

Q. Can you tell the Court whether any of these lands were being irrigated in 1907 when you started irrigating? A. They were.

Q. Were you just casually, or quite well acquainted with Joe McDonald?

A. I was very well acquainted with him.

Q. And what was Mr. Deschamp's name, Ed?

A. Yes.

Q. Were you acquainted—well acquainted with him? A. I was.

Q. Were they irrigating small tracts or quite large tracts of land under this McDonald-Deschamps Ditch?

A. Well part of them were irrigated more than others. [373]

(Testimony of George Buckhouse.)

Q. Do you remember at that time during the years 1907, 1908 and 1909, how much of the Frank Fiddler allotment was being irrigated?

A. I imagine about 20 acres of it.

Q. And what would you say, what portion of the William Deschamps allotment was being irrigated?

A. Well I think most all of it.

Q. And what would you say about the Ed Deschamps allotment, how much of that land?

A. There was about 40 acres of that, as near as I can remember.

Recross Examination

By Mr. Simmons:

Q. Referring again to the Emma Magee allotment, Mr. Buckhouse, you testified that approximately 30 acres of that allotment was gravel?

A. Gravelly subsoil.

Q. What portion of the allotment—on what portion of the allotment was the gravelly portion?

A. Why about 30 acres of it.

Q. Well was it on the southeast corner of this allotment?

A. Well it run practically through the middle of the allotment—very near.

Q. What is the character of the soil on that allotment?

A. It is clay and gravelly subsoil in the middle and then the other is clay subsoil.

(Testimony of George Buckhouse.)

Q. You testified that of the Edward Deschamps allotment there were 40 acres irrigated?

A. About that—I couldn't say exactly how much.

Q. Was it pasture or grain? [374]

A. Well both pasture and grain.

Q. And could you approximate how much pasture and how much grain there was?

A. Well I couldn't say, particularly, how much.

Q. Well then you would say that approximately half of that allotment was——

A. —I would, yes.

Recross Examination

By Mr. Smith:

Q. How long has it been since you have been intimately acquainted with those lands?

A. Oh I am over that country a good deal all the time.

Q. When did you quit farming up there?

A. In 1911.

Q. With respect to the various figures and acreages that you have given us did you make any effort or anything of that sort to estimate any of these acreages about which you testified?

A. No I didn't.

Q. And the figures that you have given us are simply your recollection of those——

A. —Just an estimate, yes.

(Testimony of George Buckhouse.)

Q. And when were those estimates made?

A. Well at the time I was farming there.

Q. That was back in 1911? A. Yes.

Witness Excused.

B. W. ALEXANDER,

one of the defendants, was called as [375] a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name is B. W. Alexander?

A. Yes sir.

Q. And you are one of the defendants in this case? A. Yes sir.

Q. And do you now own and occupy the allotment referred to as the Duncan McDonald allotment? A. Yes sir.

Q. And when did you acquire that piece of property? A. In 1933.

Q. And you have obtained that from whom?

A. From a man named McMilligan.

Q. Have you been living on this land since 1933?

A. Yes sir.

Q. And I believe your land is located east and above what is known as the Pablo Feed Canal?

A. Yes sir.

(Testimony of B. W. Alexander.)

Q. Is it possible for you to obtain any irrigation water out of the government ditch? A. No sir.

Q. Well do you use irrigation water up there?

A. Yes sir.

Q. Where do you get that water?

A. I get it out of what is known as the McDonald-Deschamps Ditch.

Q. How much of that 80 acres of land do you irrigate?

A. Well I have been irrigating, I should judge, about 40 [376] acres.

Q. Is that all ploughed up or do you use some on your pasture?

A. No—some pasture—there are 20—there is about 20 acres of that has been ploughed.

Q. About 20 acres of ploughed land you use water on and about 20 acres of pasture?

A. Yes, the meadow land.

Q. The McDonald-Deschamps Ditch forks on your place doesn't it?

A. Well it doesn't—yes there is a ditch taken out from there that goes to Stevens and other people.

Q. And crosses the Pablo Feed Canal in two flumes? A. Yes sir.

Q. Well do you know how much water you use on this 40 acres of land? A. No sir.

Q. You have never measured it?

A. No sir there is no way of measuring it.

(Testimony of B. W. Alexander.)

Q. Do you waste any of that water that you use for irrigation purposes?

A. No sir not a bit.

Q. Well if any of that water gets away from you when you are irrigating where does it go to?

A. Goes into the canal, the government ditch.

Q. The canal runs practically parallel with your piece of land does it?

A. Yes, sometimes within a couple or 300 feet.

Q. And does all of the water that gets away from you, if any does, go into this Feeder Canal?

[377]

A. Yes sir.

Q. How did you happen to purchase this particular piece of land?

A. Well I was looking for a home and I was told by Mr. Angus McDonald about this place——

Mr. Smith: Object to that as hearsay.

Q. No, I asked you how you happened to pick out this particular piece of land to purchase?

A. Well I went up to look at it and it was what I thought I wanted so I bought it.

Q. Well did the fact that there was water on this piece of land influence you any?

A. Yes sir I wouldn't have bought it if there hadn't been.

Cross Examination

By Mr. Simmons:

Q. Did you know that land had a Secretarial right—one of these private water rights?

(Testimony of B. W. Alexander.)

A. Well I don't know as I knew it at the time, no.

Q. Not at the time you purchased the land?

A. No.

Q. But you did know subsequently?

A. Well yes I did.

Q. And did you know the amount of your Secretarial right? A. Not at that time.

Q. Well do you know it now? A. Yes.

Q. That is—I am referring to Plaintiff's Exhibit 8—the Duncan McDonald allotment, the Secretary granted, according to this portion of the exhibit, the right to 16.8 acres. You stated you had irrigated 40 acres of it on the allotment at [378] this time? A. Yes.

Mr. Smith: We have no cross examination.

Witness Excused.

C. L. McVEY

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name please?

A. Clarence McVey.

Q. Where do you reside?

A. At Northport, Washington.

(Testimony of C. L. McVey.)

Q. What business or occupation are you in?

A. Immigrant Inspector in the Naturalization Service at Northport.

Q. For the United States government?

A. Yes sir.

Q. Is John Hazel related to you?

A. He is my father-in-law.

Q. Where is Mr. Hazel this morning?

A. He is in the hospital.

Q. He got hurt?

A. He was injured yesterday evening.

Q. Do you now own what was formerly known as the Florence McDonald allotment?

A. I do.

Q. When did you purchase that?

A. In August of 1934. [379]

Q. From whom?

A. The Beckwith Mercantile Company of Saint Ignatius, Montana.

Q. And have you lived on that land at any time since you purchased it? A. I have not.

Q. Who occupies it now?

A. My father-in-law, John A. Hazel.

Q. And he is still living on that land?

A. He is.

Q. You have been on the land have you?

A. I have.

Q. Will you tell the Court how you happened to purchase that particular piece of land?

(Testimony of C. L. McVey.)

A. Well I was looking for a piece of land for a home for my father-in-law and for an investment.

Q. At the time that you purchased this land did you know or believe that the land had a private water right or some free water? A. Yes sir.

Q. Did that fact influence you at all in purchasing this piece of land? A. It certainly did.

Q. I will ask you if the purchase price that you paid, or the consideration you paid for this place was made partly in payment of the water?

A. I would say that I gave more for the land, due to the fact—or was willing to give more for the land—due to the fact that it had free water.

Q. And can you tell us—has your father-in-law, Mr. Hazel, [380] been using water for irrigation purposes on this land since he has been occupying it? A. He has.

Q. And still is using it down to the present time?

A. I presume so, although I haven't been on the ranch for a matter of a year.

Q. Up to that time had he been?

A. Yes he had.

Q. Of course I don't suppose you know how much water he is using?

A. No sir I have no idea.

Q. And have you any knowledge how many acres he is irrigating?

A. I would estimate it to be between 30 and 40 acres.

(Testimony of C. L. McVey.)

Cross Examination

By Mr. Simmons:

Q. What investigation did you make as to the water rights to this land when you purchased it?

A. None, other than that Mr. Beckwith informed me there were water rights—free water rights on that land.

Q. Did he state that they were Secretarial rights?

A. I don't recall—he said there were certain free water rights.

Q. So you relied on Mr. Beckwith's statement?

A. I did.

Q. You asked no lawyer as to whether—about these so-called free water rights? A. No sir.

Q. Made no further investigation?

A. No; I believe that he showed me an abstract showing [381] that there were certain water rights, or, as I recall it, a warranty deed that might have mentioned free water rights.

Q. But no lawyer passed upon——

A. —No sir——

Q. —the type of water right on the land?

A. (No answer)

Q. Did you make any inquiry of the irrigation office or the Saint Ignatius office that there was such an irrigation?

A. I was in a terrible hurry when I bought the land as I had to leave the following day, and I had no time for investigating.

(Testimony of C. L. McVey.)

Mr. Smith: Your Honor, I now move that the defendant Clarence McVey be substituted as party defendant in this action in place of Beckwith Mercantile Company; apparently, unbeknown to me, this land has been sold, and apparently this person now owns the land, and the pleadings all run to the Beckwith Mercantile Company.

Mr. Wallace: May I ask another question?

The Court: Yes.

Redirect Examination

By Mr. Wallace:

Q. You purchased this land on a contract?

A. Yes sir.

Q. About the 22 of August, 1934?

A. Around that time.

Q. When did you acquire your warranty deed to it? Have you the deed with you?

A. I have the deed—September 1939, I think.

Q. I will show you the defendants' proposed exhibit 34 and will ask you what that is, Mr. McVey?

[382]

A. A warranty deed to——

Q. —From whom?

A. From the Beckwith Mercantile Company of Saint Ignatius, Montana, to Clarence L. McVey and Lillian L. McVey, husband and wife as joint tenants.

Q. Is your wife Lillian L. McVey still living?

A. She is.

(Testimony of C. L. McVey.)

Mr. Wallace: I believe we will offer this exhibit in evidence.

The Court: You say your father-in-law's name is John A. Hazel?

The Witness: Yes sir.

Mr. Smith: We have no objection.

The Court: Admitted without objection.

Mr. Wallace: I might state to the Court that this deed is dated the 22 day of August, 1934, and was recorded in Lake County on August 16, 1939.

The Court: The exhibit will be considered read into the record; any party may refer to it at any time.

Defendants Exhibit 34, the instrument referred to, and so identified, was then received in evidence and considered as read into the record, and the said exhibit is on file with the original exhibits in this case.

Mr. Smith: I now move, your Honor, that Clarence L. McVey and Lillian L. McVey be substituted as parties defendant in the place of the defendant Beckwith Mercantile Company.

Mr. Simmons: We join with the interveners in the motion. [383]

The Court: Under what theory? Your theory constantly has been that you are merely trying to enjoin somebody from doing something—we will let the record stand the way it is. Any further cross?

Mr. Simmons: No further cross.

Mr. Smith: We have no cross.

Witness Excused.

THEODORE KNUTSON,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name please?

A. Theodore Knutson.

Q. Is your wife's name Edna I. Knutson?

A. Yes.

Q. You are a defendant in this action?

A. Yes sir.

Q. You now own and occupy what is known as the Mary C. McDonald allotment number 559?

A. I do.

Q. Are you purchasing that tract of land?

A. Yes.

Q. From whom?

A. From Percy and Mary C. Meeks.

Q. When did you contract to buy that land?

A. October 8, 1934.

Q. When did you move on the land? [384]

A. October 12, 1934.

(Testimony of Theodore Knutson.)

Q. And have you and your wife been occupying it ever since? A. We have.

Q. Are you farming it? A. Yes.

Q. How much of that land is cultivated?

A. Well according to the Soil Conservation there is 32.2 acres, I think.

Q. And do you use any irrigation water on that?

A. I do.

Q. Thirty acres? A. Yes I do.

Q. Do you use any irrigation water on the balance of the land? A. Yes on the pasture.

Q. How much pasture land do you irrigate?

A. Oh approximately 20 acres.

Q. Then you have been using water on about 50 acres? A. About 50 acres.

Q. How long have you been using the water on that 50 acres? A. Since May, 1935.

Q. Where do you get this water?

A. I get it from the Reclamation and some from the McDonald Deschamps Ditch.

Q. Do you know, Mr. Knutson, how much water you are using on this land?

A. I wouldn't know.

Q. Do you waste any water?

A. Not so far.

Q. Well does any of the water get away from you? [385]

A. Well when it gets to the end of the field, the last ditch, you are bound to run it over.

Q. Where does that waste water go to?

(Testimony of Theodore Knutson.)

A. Down the natural draw.

Q. Well where does the water drain, to, from or through this draw?

A. Down to Mr. Stevens.

Q. On his land? A. Yes.

Q. Is it picked up anywhere by a ditch later or does it go on his land?

A. Well if he don't use it it runs down the draw down to D Ditch.

Q. That is the government ditch? A. Yes.

Q. Now how did you happen to purchase this particular piece of land, Mr. Knutson?

A. Well I was dry land farming for some time and dried out seven years and I thought I would get an irrigated farm and I wanted some right to water.

Q. Where were you formerly located?

A. North of Great Falls 65 miles.

Q. Dry land? A. Yes sir.

Q. And you came into Lake County to get irrigated land? A. Yes.

Q. There is a branch or lateral from the McDonald-Deschamps Ditch on to this piece of land?

A. Yes.

Q. Was that ditch there when you purchased the land? [386] A. It was.

Q. How much did you pay for this land or agree to pay? A. \$2500.00.

Q. Now what was your understanding about this water when you purchased the land?

(Testimony of Theodore Knutson.)

A. Well from the understanding that there was plenty of water there, there were ditches on the place, Reclamation water and free ditches.

Q. Did you understand you had some free water? A. I did.

Q. Did that fact influence you at all in purchasing this piece of land? A. It did.

Q. Was part of the purchase price that you agreed to pay for this land in payment of the water also?

A. Well about half of it, I figured.

Cross Examination

By Mr. Simmons:

Q. Do you know how many acres you have under the government project?

A. Well 27.2 I believe.

Q. And the balance is under the McDonald-Deschamps Ditch? A. Supposed to be.

Q. At the time you purchased this land did you make any investigation as to the validity of your so-called free water or private water rights?

A. Well the agent I bought it from told me about it, and after he left I went down to Mr. Stevens, my neighbor on the west, and I asked him, and he told me that there was free water for the place. [387]

Q. Did he mention any Secretarial rights?

A. No he didn't, he just said there was free water for the place.

(Testimony of Theodore Knutson.)

Q. Did you request any information from the project office at Saint Ignatius?

A. Not at the time, no.

Q. You have talked to them later?

A. Yes sir.

Q. And did they advise you that you have Secretarial rights to your land?

A. Well 3.2 acres, I believe it was.

Q. You are, in fact, irrigating 50.2, 27.2 of which is served by the government project, is that right?

A. What is that?

Q. 27.2 of which are served by the government project ditches—that is, 27.2 of this 50.2 acres are irrigated by government project, and the balance out of the McDonald-Deschamps Ditch?

A. Well I use both waters at the same time.

Cross Examination

By Mr. Smith:

Q. Do you have any way of knowing how many acres you irrigate with water that comes from the McDonald-Deschamps Ditch?

A. No I haven't exactly.

Q. Well do you cover more than 3.2 acres with that water? A. Yes I do.

Q. And approximately how much more do you cover?

A. Well everything that is dry, that needs it.

Q. Well I say approximately how much more, could you tell me? [388]

(Testimony of Theodore Knutson.)

A. Well something around 18—20 acres—22—somewhere in there, I imagine.

Witness Excused.

And thereupon at 10:50 o'clock a. m. recess was had for ten minutes, at the expiration of which time the trial was resumed.

P. W. SORENSON,

one of the defendants, was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Give us your name please?

A. P. W. Sorenson.

Q. And where do you live?

A. Ronan at the present time.

Q. You are one of the defendants in this action?

A. Yes sir.

Q. Did you at one time purchase the Frank Fiddler allotment?

A. I did.

Q. You still own that land ?

A. Yes sir.

Q. When did you buy that, Mr. Sorenson?

A. Well I think it was '28.

(Testimony of P. W. Sorenson.)

Q. 1928? A. 1928.

Q. And you purchased it from whom?

A. Frank Fiddler. [389]

Q. Frank Fiddler. Did you live on that land for a while? A. Yes I did.

Q. For how long? A. Four years.

Q. When did you first move on it?

A. It was in 1930 I think, if I remember right, 1930.

Q. You lived there four years after that?

A. Yes.

Q. And have you lived on the land since?

A. No I have not.

Q. Has it been occupied by some other person?

A. Yes.

Q. You have a renter?

A. I have a renter, yes.

Q. And has the same renter been on that land since 1935, that is there now? A. No.

Q. Who rented it first?

A. Why it was Fred Wallace was on there three years.

Q. And after he occupied the land who occupied it? A. George Wyman.

Q. And is the land rented now?

A. No it isn't; I farm it myself, some of it.

Q. Now how did you happen to purchase this land?

A. Oh I liked the place and there was a water right on it and little creek going through it.

(Testimony of P. W. Sorenson.)

Q. What is the name of that creek?

A. June Creek.

Q. That goes through this allotment does it?

A. Yes. [390]

Q. You say there is a water right on the land?

A. Yes.

Q. What did you understand about this water right?
A. Yes.

Q. What did you understand about this water right at the time you purchased the land?

A. Well I understood that there was a water right for it—water coming through the McDonald-Deschamps Ditch.

Q. You mean private water right.

A. Yes private water right.

Q. Or under the government ditch?

A. Out of the McDonald Ditch.

Q. The McDonald-Deschamps Ditch?

A. Yes.

Q. Did that fact influence you at all in the purchase of this piece of land?
A. Yes it did.

Q. Did you look around on the reservation for a piece of land before you bought this piece?

A. Why no I didn't.

Q. During the time you occupied the land did you use any of this water out of the McDonald-Deschamps Ditch?
A. Yes.

Q. For irrigation purposes?
A. Yes.

Q. During the four years you were living on it how much of this allotment did you irrigate?

(Testimony of P. W. Sorenson.)

A. Well I irrigated all that could be irrigated.

Q. And about how much can be irrigated?

A. Fifty-five acres. [391]

Q. And you irrigated practically all of that 55 acres?

A. Yes I irrigated 55 acres.

Q. Wholly with water from the McDonald-Deschamps Ditch?

A. Yes sir—well no, part from the regular Mission water.

Q. Do you know how many acres you irrigated with water from the McDonald-Deschamps Ditch?

A. No I couldn't tell exactly.

Q. Do you know how many acres you irrigated with water from the government ditch?

A. No I didn't keep track of it. I used both at the same time.

Q. Had the men who had been renting that land from you since they were there been using water on it, do you know?

A. Yes they had been using water.

Q. Do you know whether or not they have been irrigating practically all of this 55 acres?

A. Yes they have.

Q. And I believe you stated you are farming the land this year?

A. Yes.

Q. 1939. And have you used any water on the land yet this spring?

A. No.

Q. You expect to?

A. Yes.

Q. Have you any way of knowing how much

(Testimony of P. W. Sorenson.)

water you used on this land during the time you were living on it?

A. No—well it took $2\frac{1}{2}$ or 3 feet—was sufficient for an acre, to irrigate it.

Q. About what, $2\frac{1}{2}$ to 3 acre feet? [392]

A. Yes, $2\frac{1}{2}$ to 3 acre.

Q. And was that about the amount of water you used?

A. Yes that was about what I used to get a fairly good crop.

Q. Now during the time you were living on this land did you waste any of this irrigation water?

A. No I didn't, only there might be a little, you know, when you get to the end of the field, there is bound to be a little waste, you know.

Q. There is bound to be some waste?

A. Oh yes, you can't help it.

Q. What becomes of that waste water that goes off your place?

A. Well some of it goes to June Creek and some of it goes in a natural draw.

Q. Well now whenever that goes into June Creek what becomes of that water?

A. Well it runs into the ditch or F—Canal F.

Q. That is the government ditch?

A. Yes the government ditch.

Q. And you said some of it goes where else—into a draw?

(Testimony of P. W. Sorenson.)

A. Yes on the north side, it goes into a draw and then goes into the canal too.

Q. That goes into the government canal?

A. Yes.

Q. So that none of the waste water or the water that is wasted on your place, actually is wasted?

A. No.

Q. Do you need this water for irrigation purposes up there to irrigate this farm?

A. Oh yes absolutely. [393]

Q. Why?

A. Oh it is—it would be dry, of course, you know.

Q. Well I mean can you raise better crops with water? A. Oh yes.

Q. Does the land need irrigation?

A. Yes the land needs irrigation.

Cross Examination

By Mr. Simmons:

Q. You say you purchased the land in 1928?

A. Yes sir, so far as I remember.

Q. Did you make any investigation as to water rights at that time? A. I did.

Q. And what were they—what investigation did you make?

A. Well I went to the court house and it showed the whole place was under the ditch, that is, McDonald-Deschamps Ditch, and the Mission it showed 18 acres and seven-tenths, I think.

(Testimony of P. W. Sorenson.)

Q. Well isn't it 29.7, the correct acreage under the project that you pay charges on? A. Yes.

Q. And——

A. —29.7 is what I am paying on now.

Q. And the balance is out—in fact you are irrigating 55 acres—and the balance is irrigated under the McDonald-Deschamps Ditch? A. Yes sir.

Q. Did your investigation show the number of acres to which your private water right attached?

A. Well yes it did.

Q. At the Mission office? [394]

A. Yes, Mr. Moody told me.

Q. I mean the right under the McDonald-Deschamps Ditch—was there anything in your investigation from which you determined you had a right to take water out of the McDonald-Deschamps Ditch?

A. Yes I investigated that I had a right to take water out of the ditch.

Q. That is, you investigated at the project office at Saint Ignatius? A. Yes.

Q. Did they tell you how many acres you could irrigate out of the McDonald-Deschamps Ditch?

A. Yes.

Q. Do you remember how many acres they told you you had a private right to?

A. Eighteen and some-tenths.

(Testimony of P. W. Sorenson.)

Cross Examination

By Mr. Smith:

Q. Did you measure the water that you use on your land?

A. No, I have no way to measure it.

Q. You don't have any way to—any weirs?

A. No the government never put any gate in for the government water or anything.

Q. Do you have any weirs to measure the water you take out of the McDonald-Deschamps Ditch?

A. No.

Q. And how do you calculate the amount of water which you use on the land in those years?

A. Oh well I kind of estimated what I got from the Reclamation, when I got water from there, you know, when they [395] sent me down a foot and a half, why I kind of figured it that way, how much it would take to irrigate an acre.

Q. And when they sent you down a foot and a half—what do you mean by that?

A. A foot and a half of water.

Q. That would be cubic foot and a half?

A. Not an acre foot—what they call a foot of water or a foot and a half—I don't know how they measure it.

Q. Now then how do you translate cubic feet of water into acre feet? A. I don't know.

Witness Excused.

EVERY A. STEVENS,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name please?

A. Avery Stevens.

Q. And you are one of the defendants in this action? A. I am.

Q. You live up in Lake County?

A. Lake County, Saint Ignatius.

Q. Do you now own what was formerly known as the William Deschamps allotment, number 781?

A. I do.

Q. When did you purchase that land?

A. I believe it was in 1929. [396]

Q. In 1929?

A. Yes in 1929; I went on it in 1928.

Q. Did you rent it that year?

A. I rented it one year.

Q. And then purchased it?

A. And then purchased it.

Q. Now I believe you also own the north 30 acres of the Edward Deschamps allotment, number 783, do you not? A. I do.

Q. And did you rent that portion at the same time you rented the other allotment?

A. I did.

(Testimony of Avery A. Stevens.)

Q. And did you purchase this 30 acres at the same time you purchased the 80? A. I did.

Q. All one transaction?

A. All one transaction.

Q. And have you been living upon and occupying and farming this 110 acres ever since 1928?

A. I have.

Q. And are so living there now?

A. Still there.

Q. Mr. Stevens how do you use water on this 110 acres? A. I do.

Q. Where do you get the water from?

A. McDonald-Deschamps Ditch.

Q. Do you get any government water?

A. I do.

Q. And have you been using water from the McDonald-Deschamps Ditch ever since you have been living on this land? [397] A. I have.

Q. Are you able to tell the Court how many acres of the 110 acres you irrigate with water from the McDonald-Deschamps Ditch?

A. Well I have irrigated it all excepting just an acre or something where the house is and the barn, practically the whole 110 acres.

Q. From this McDonald-Deschamps Ditch?

A. I have.

Q. Have you used some water from that ditch every year since you have been there?

A. I have.

(Testimony of Avery A. Stevens.)

Q. Why do you use some government water?

A. Well, chances are I would be a little bit behind and want a little bit bigger head, wanted to do it a litter faster, maybe, was a reason, and as they have me charged with some water I thought maybe I might use a little to catch up.

Q. You are charged with some government water?
A. I am.

Q. Well, whether you use it or not?

A. Yes sir.

Q. How much did you pay for these 110 acres?

A. I believe I gave \$6000.00.

Q. At the time you purchased the land did you make any investigation relative to the private water?
A. I did.

Q. Well what understanding, if any, did you have about this private water at the time you bought it?

A. Well it showed that I had some free water right belonging to the land, I believe from the Reclamation, and also in Polson. [398]

Q. Well did the fact that this—some of this land had a private water right influence you in purchasing it?
A. It did.

Q. Could you have purchased land elsewhere on the reservation under the government ditch at a much cheaper price?
A. I could have.

Q. Do you know how much water you have been using on this land during the time you have been irrigating?
A. No I couldn't say.

(Testimony of Avery A. Stevens.)

Q. You didn't measure it? A. No.

Q. And did you have any experience with water before you went on to this land? A. I have.

Q. Where? A. Well, Southern Idaho.

Q. Now in irrigating this 110 acres do you waste any water? A. No sir.

Q. How—what parts of that ranch are cultivated—do you raise crops on?

A. I don't just get that.

Q. How many acres do you farm?

A. Farm it all.

Q. You don't use any of it for pasture?

A. Oh I got a little pasture but all that is irrigated.

Q. Well how many acres do you actually farm and raise crops on?

A. All of it I guess but about 17 acres I got pastured; the rest of it is all farm land.

Q. Do you irrigate the pasture land? [399]

A. I do.

Q. Now is it necessary that you irrigate this land that you raise crops on? A. Yes sir.

Q. Can you raise better crops with water?

A. I do.

Q. Do you waste any water in irrigating this land of yours?

A. No sir I don't believe I do.

Q. Well you are the only person that knows—do you intentionally waste any water on it?

A. No sir.

(Testimony of Avery A. Stevens.)

Q. Well in irrigating land does some get away from irrigators? A. Oh yes.

Q. That is a sort of a natural waste, is it?

A. Yes sir.

Q. Now if any of this water gets away from you and is wasted, where does this waste water go, from your place?

A. Goes in Lateral B, in the government ditch.

Q. So that it is picked up in the government B Lateral ditch? A. Yes.

Q. And none of it actually goes to waste?

A. I don't know what they do with it then.

Q. But it goes into the government ditch?

A. It goes into the government ditch.

Cross Examination

By Mr. Simmons:

Q. What part of this 110 acres is covered by the private water right? [400]

A. I use it all when I need it.

Q. In other words you don't know what private rights you have? A. No sir.

Q. You say you made an investigation of your private rights at the time you purchased this land; where did you make this investigation?

A. At the Reclamation Office in Saint Ignatius.

Q. Did they advise you at that time as to how many acres were covered in that private right?

A. 11.9, I believe at that time.

(Testimony of Avery A. Stevens.)

Q. And do you know how many acres you have under the government project on which you are paying charges?

A. Well the balance of it.

Q. You would say you are paying charges, then, on practically 100 acres, to the government?

The Court: Is that a fair subtraction?

Mr. Simmons: Well I will say 98.1 acres to the government.

The Court: Let's straighten that out. How much were you told was under the free ditch?

The Witness: I believe 11.9, if I am right.

Q. 11.9 was under the McDonald-Deschamps Ditch? A. Yes.

Q. Now as to the balance—you testified you were irrigating 110 acres? A. Yes.

Q. As to the 98.1 acres you are irrigating, is that under the government project and do you pay charges on that acreage? A. I do. [401]

Mr. Simmons: That's all.

Cross Examination

By Mr. Smith:

Q. In irrigating, Mr. Stevens, is it possible to put more water on the lands than the lands will absorb, so that a portion of it will go down in the subsoil, from which you get no beneficial use?

A. More water than the land takes?

Q. Yes. A. Is that the question?

Q. Yes sir? A. No sir.

(Testimony of Avery A. Stevens.)

Q. That is, you can't, on any given piece of land, put more water on that—put more water on to the land itself—than the land will hold?

A. I don't believe so.

Q. Is there such a thing as seepage of irrigating water down through the subsoil and down into the earth?

A. Seepage through subsoil?

Q. Yes sir, down into the earth?

A. I think so.

Q. Do you know whether or not any of the water used for irrigation seeped down into the earth and is lost in that manner?

A. I do not.

Redirect Examination

By Mr. Wallace:

Q. Let me ask you—when you say there is a private water right to 11.9 acres, did that apply only to the William Deschamps 80 or to the whole 110? [402]

A. Well it applied to the whole 110, I believe, at the time it should have, I don't know if it showed that, but the 110 acres had that much water right.

Mr. Simmons: Now, for the Court's information, that just applies to the William Deschamps—he has another water right.

Mr. Wallace: I think the witness is confused.

The Court: That's what I thought he said he had.

Q. Isn't it true that the 11.1 private water right applies only to the William Deschamps 80?

(Testimony of Avery A. Stevens.)

A. I think so.

Q. And that the 62.8 acres, that allotment is under the government ditch? A. Yes sir.

Q. Now then on the Edward Deschamps allotment consisting of 80 acres of which you own the north 30, there are, according to the records, 10.3 acres of private water rights on the whole 80?

A. I think so.

Q. So that you own some portion of that 10.3 acres on the 30 acre tract? A. Yes.

Q. And about—I will ask you if this is true—and about 24.1 acres of this 30 is under the government assessment? A. I believe so.

Q. Now Mr. Pierce owns the south 50 acres, doesn't he? A. Yes.

Q. Of this 80? A. Yes sir.

Q. Mr. Stevens, can this 30 acres that you own of the Edward [403] Deschamps allotment be irrigated from the government ditch?

A. It cannot.

Q. Why not? A. There is no ditch built.

Q. Has there ever been a government ditch from which this 30 acres could be irrigated?

A. No.

Q. And there is not, even today?

A. No sir.

Recross Examination

By Mr. Simmons:

Q. Mr. Stevens on this 30 acres located on the Edward Deschamps allotment, which you say is

(Testimony of Avery A. Stevens.)

under the government project, to which there is no ditch to deliver water through, or through which to deliver water, have you ever made any demand for water from the government—have you ever asked them to construct a ditch so they could deliver water?

A. No sir.

Recross Examination

By Mr. Smith:

Q. Do you know, Mr. Stevens, what the—how much water, that, the Secretary, allocated to the north 30 acres?

A. I do not.

Q. To the Edward Deschamps allotment?

A. Of free water right?

Q. Yes, free water?

A. Well there was some I believe, but I couldn't just state the amount.

Q. Well if I were to tell you it was .8 of an acre in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, Township 19 North, Range 19 West, [404] would that be in accordance with your recollection?

The Court: Well he says he doesn't know.

Mr. Smith: That's all.

Witness Excused.

MEIL C. PIERCE,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Give your name to us, please?

A. Meil C. Pierce.

Q. You are one of the defendants in this action?

A. Yes sir.

Q. Where are you living now?

A. I am living in the town of Saint Ignatius.

Q. I believe you own the south 50 acres of the Edward Deschamps allotment, number 783?

A. I do.

Q. Is that correct? A. Yes sir.

Q. When did you contract to purchase that land?

A. In March 1926.

Q. And you bought it on a contract did you?

A. Yes sir.

Q. Afterwards acquired a deed to the property?

A. Yes sir.

Q. Now did you live on that land for a while?

A. I lived on that land continuously until a little over [405] two years ago.

Q. When did you first go upon the land to live?

A. I went there in April, the first day of April.

Q. Of what year? A. 1926.

Q. And you lived there continuously up until a couple of years ago? A. Yes sir.

(Testimony of Meil C. Pierce.)

Q. Did you farm that 50 acres during the time you were living on it? A. Yes sir.

Q. And how much of the 50 acres is cultivated?

A. There is around between 38 and 40 acres there cultivated.

Q. What is the balance, pasture land?

A. Pasture.

Q. And did you use irrigation water on the cultivated portion? A. On the pasture?

Q. Yes.

A. I have used very little water on the pasture because of the fact that my pasture is covered with—well, little springs, and it don't require any more water, the biggest part of it.

Q. Springs rise on your pasture land?

A. Yes.

Q. And have you used irrigation water on the land that is cultivated? A. Oh yes.

Q. And why?

A. Because I can't grow any crops to amount to anything [406] without it.

Q. The land requires water to raise crops, does it? A. Yes sir.

Q. Where do you get this water that you irrigate your land with?

A. I get it from the McDonald-Deschamps Ditch.

Q. And had you used water from that ditch during all of the time you farmed this land?

A. Yes sir.

(Testimony of Meil C. Pierce.)

Q. Do you know how much water you used, Mr. Pierce?

A. No that would be hard to tell as we have no measuring device there and the only way that I could judge at all of that, there has been a few times that I have used some Reclamation water and had them turn it there, and with that it is hard to judge because there is no ditch running from the A Canal down to my place, it is just turned in a draw there, June Creek, and whenever there is any amount of water turned down there it spreads all of the country there and I can only use about so much of it.

Q. Well where does this water come from that gets into June Creek?

A. It comes from right straight east of my place there.

Q. Well does it rise east——

A. —It dries up in the summer; it just runs a little while in the spring, snow water.

Q. That isn't water out of the government ditch?

A. Oh no.

Q. It rises there east of your place?

A. But however, at the present time that flume has been taken away from there, I think some eight or ten years ago; [407] I don't remember just what time it was that—probably Mr. Sperry could tell that—at the time they had that meeting, Mr. Moody was here, and that June Creek water was turned

(Testimony of Meil C. Pierce.)

from Lish over to the McDonald place up there above the ditch.

Q. Was that a flume across the——

A. —There was a flume across the ditch.

Q. Which ditch? A. The A Canal.

Q. Is the A Canal what is called and known as the Pablo Feed Canal?

A. Yes, that is, the upper canal.

Q. Is this land of yours now rented?

A. Yes sir.

Q. Some farmer living on it? A. Yes sir.

Q. What is his name? A. Antone Klick.

Q. Is he using water to irrigate the land?

A. Yes sir.

Q. How much did you contract to pay, and pay for this 50 acres? A. \$5,000.00.

Q. Did you make any investigation with reference to the private water on this land when you bought it?

A. Not as much as I should have done; I was given to understand that it had private water for the whole place; the creek run right close to my place and I was given to understand, when I bought it, that there was private water, but later I talked with Mr. Moody, who was the project engineer at the time, and he told me that there was only 8.3 acres [408] private right, but all of the old timers around there told me that that was a mistake, that they knew that; they told me when that had been irrigated and the ditches gotten out for that piece

(Testimony of Meil C. Pierce.)

to irrigate that, but afterwards for that they only want to allow me 8.3 acres.

Q. Well when you had the talk with Mr. Moody was that after you bought the land?

A. Yes it was after I bought the land.

Q. And at the time you bought the land did you understand from these old timers you say—

A. —Yes sir, and from Bill Larson, the man that was handling the lands, a real estate man.

Q. Bill Larson at that time was a representative of the Northern Pacific Railway Company?

A. Yes—he represented the Vermont Loan.

Q. Vermont Loan and Trust Company?

A. Yes sir.

Q. May I ask you again, at the time you bought this land did you understand that you had a private water right for all of the land?

A. Yes, when I bought it.

Q. Well if you had not so understood it would you have purchased this piece of land?

A. I don't think that I would have given that price.

Q. Well what is the value of the improvements on that land?

A. Oh I would judge around \$1500.00, and that was plenty high.

Q. At the time you bought this land could you have purchased a piece of land under the government ditch, well improved, for less money? [409]

A. Well I bought another 80 acres of land down

(Testimony of Meil C. Pierce.)

adjoining Tom Wald's; I gave \$1200.00 for the 80, because there was no private water right on it.

Q. And that 80 you bought adjoining Tom Wald's, or near Tom Wald's——

A. —It joins Tom Wald's.

Q. Was that under the government ditch?

A. Yes sir.

Q. And when did you buy that piece of land?

A. I bought it in 1929 but I didn't get the transfer until 1930.

Q. And at the time you bought the 50 acres could you have purchased land in that vicinity, that didn't have a private water right but that was under the government ditch, at a cheaper price?

A. Yes, much cheaper; I spent two days with Bill Larson going all over the Flathead looking for a place, and I told him that I wanted a place where I could work and have a small little dairy farm and be a home, that I wasn't able to handle anything very big, and we looked at places from Arlee to Polson, and drove in there and he told me the conditions of the place and the place, and I told him I would take it.

Cross Examination

By Mr. Simmons:

Q. Do you have any of your lands under the government project system?

A. It is all under it.

Q. I mean this particular 50 acres, is that under

(Testimony of Meil C. Pierce.)

the operation and maintenance charges of the government?

A. On about 27 acres of it, I think. [410]

Q. Do you get any water from the government ditches?

A. I have been getting a little private water and lately there has been a few times that I have got a little water from the Reclamation.

Q. But you actually irrigate your land with the waters you receive from the McDonald-Deschamps Ditch, is that not right?

A. Most of it, yes.

There was no cross examination by Mr. Smith, and the

Witness Excused.

BERT MYERS NELSON,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name is Bert Myers Nelson?

A. Yes sir.

Q. And you are one of the defendants in this action? A. I am.

Q. You own and possess what is known as the Oro Deschamps allotment 784? A. I do.

(Testimony of Bert Myers Nelson.)

Q. How long have you owned that land?

A. I have owned half of it since 1926, and I bought the south 40 in April of 1939.

Q. You bought the first 40 in 1926?

A. Yes.

Q. Now did you move upon that forty at that time?

A. I moved on—I bought his 20 acres—I moved one of the [411] buildings on what is now the Joe Turnidge 80, and that other 40 in the north 40.

Q. Of the Oro Deschamps?

A. Of the Oro Deschamps.

Q. Well did you start farming this Oro Deschamps allotment or this 40 in 1926? A. I did.

Q. And have you farmed it ever since?

A. Yes.

Q. And have you been farming the south 40 since you owned that? A. Yes.

Q. Have you been using water to irrigate that land with? A. I have irrigated it all, yes.

Q. During the time you were irrigating the north 40 of the Oro Deschamps allotment where did you get the water?

A. Well I got most of it from the government ditch.

Q. Where did you get the rest?

A. From Post Creek — McDonald-Deschamps Ditch.

Q. Well how many—do you know how many acres of this 40 you irrigated from the McDonald-Deschamps Ditch?

(Testimony of Bert Myers Nelson.)

A. Well I irrigated all I could with the water that come down there.

Q. How much is that?

A. Oh I would say it must have been around 12 acres.

Q. Are you sort of on the tail end of this McDonald-Deschamps Ditch?

A. I am at the very end of it, yes sir.

Q. And you only have what water is left after the men ahead of you have used out of that ditch?

[412]

A. That's it exactly.

Q. Well has there ever been enough water coming down the McDonald-Deschamps Ditch to irrigate all of the 40?

A. Well that south forty I bought last spring, there has never been any Reclamation water used on it.

Q. You irrigate that south forty?

A. The whole south forty is irrigated, yes.

Q. Where do you get the water for that?

A. Well that has come from McDonald Lake ditch and June Creek.

Q. You get them both, do you?

A. Yes, in fact the water from McDonald Lake comes down June Creek.

Q. Why do you irrigate that land?

A. Because it isn't worth farming without it.

Q. You have to irrigate it to raise crops?

A. To raise crops that is worth farming.

(Testimony of Bert Myers Nelson.)

Q. Now have you ever wasted any water on this eighty? A. I can't waste any water.

Q. Why not?

A. Well my place—C Canal runs right through it and there is no water—it don't get to my place until it is in C Canal, except some of it in the northwest end of Tom Wald's ditches that might run into C Ditch there.

Q. Yes, B Canal runs through your place?

A. B Canal crosses the north end of my place.

Q. And C Canal below?

A. Lower on my place.

Q. And any of this water that gets away from you it is picked up by both these canals? [413]

A. From only C Canal.

Q. Have you any way of knowing how much water per acre you have used on this land?

A. You mean on this forty?

Q. Yes.

A. No I have no way of telling.

Q. Well on either forty?

A. Well I know what I use from the Reclamation any year, I use all the water I can get.

Q. You get some from the Reclamation?

A. Yes sir, that is, for all except this south forty of the Oro Deschamps.

Q. The north forty of the Oro Deschamps land, part of it is under the government ditch?

A. Yes sir.

Q. I will ask you if 29.7 acres, is that about the amount out of the government ditch?

(Testimony of Bert Myers Nelson.)

A. Well I can't exactly remember the tenths, but that sounds about what I'm under the impression it was.

Q. And you are charged under the government ditch for that number of acres, or about that?

A. Yes.

Q. Whether you use it or not? A. Yes sir.

Q. Now about how much did you pay for this whole eighty?

A. The Oro Deschamps eighty?

Q. Yes.

A. Well in the deal it figured out better than \$6000.00; I bought one forty and then last spring I bought this other forty—this Oro Deschamps I figure stands me a little [414] better than \$6000.00.

Q. And at the time you purchased this land did you make any investigation as to whether or not it had a private water right?

A. No further than from the man I bought it from.

Q. Who did you buy it from?

A. My uncle, Bert Lish.

Q. What understanding did you have about this water at that time?

A. Well he told me he had water on his entire forty and I could get water on mine—that is, to the Oro Deschamps eighty.

Q. Did you at any time make any investigation or have any conversation with the Reclamation officials?

(Testimony of Bert Myers Nelson.)

A. Not until after I thought of buying this south forty of the Oro Deschamps land.

Q. Well did the fact that you understood this north forty had private water rights——

A. —I understood it had it, yes.

Q. Did that fact influence you at all in purchasing this land?

A. Well if I hadn't had that I wouldn't have bought the land.

Q. What about the south forty?

A. Well he held that as his home—he owned 160, and he held that as his home and wouldn't sell it until last spring.

Q. When you purchased that did you have any understanding?

A. As to water?

Q. Yes.

A. Before I bought it I went down to the office and asked about private water on that forty and I was told that had [415] 35 acres on it at the time when I saw them and I supposed I had 35 acres, because he never run any water and I didn't inquire as to where this water come from but after this intervention I learned I only had seven and two or three-tenths acres on that forty, the same as the other forty, and I went down to find out about the balance of the water and there was 29 and some tenths went out of June Creek.

Q. What did you say about this 35 acres?

A. Well that was supposed to have that private water on it.

(Testimony of Bert Myers Nelson.)

Q. Where did you get that information?

A. From the man I bought it, and the Reclamation office.

Q. Did you ever receive any letter from the project engineer concerning this private water right?

A. No sir.

Q. Concerning this 35 acres?

A. No sir.

Q. What relation did you say Bert Lish is to you?

A. My uncle.

Q. Do you know whether or not he received a letter concerning this 35 acres?

A. No I don't—well now I may have received a note from Mr. Sperry, or some of the officers, after I was down there and inquired as to this other water right and where it came from; there was some investigation to be made and they did send a note of what they found there in the office, the same evidence they give me when I was there.

Q. I show you defendants' proposed exhibit 35 and I will ask you if you know what that is?

A. Well that was in my—in the deed that I bought the place. there was a copy—either this or a copy of it—it [416] was in the first—yes, it shows what has been decreed by the Secretary of the Interior——

Q. —Well to whom is this letter addressed?

A. Well it was to the defendants in this case I suppose.

Q. And do you know who signed this letter?

A. I think Mr. Gerharz.

(Testimony of Bert Myers Nelson.)

Q. Is that Mr. Gerharz the engineer?

A. Mr. Gerharz the engineer, yes sir.

Q. It is addressed to several people, is it?

A. I presume so, yes, it was on with the deed I got to the forty.

Q. Let me ask you to look at it and see?

A. Yes this is addressed to all the defendants.

Q. And there is a red check mark with a name there?

A. The name of Lish, the man from whom I bought the forty.

Q. And you got this letter along with——

A. —The deed to the forty.

Q. Which you purchased from Lish?

A. Yes.

Q. And this letter relates to the private water on the Oro Deschamps allotment? A. Yes.

Mr. Wallace: We offer defendants' proposed exhibit 35 in evidence.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 35, being the instrument referred to, and so identified, was then received in evidence and is on file with the original exhibits in this cause. [417]

(Testimony of Bert Myers Nelson.)

DEFENDANTS' EXHIBIT 35

Department of the Interior
U. S. Indian Irrigation Service
Flathead Irrigation Project

St. Ignatius, Montana July 12, 1935

Mr. Bert Nelson;

Mr. Bert Lish;

Mr. Avery Stevens;

Mr. P. W. Sorenson;

Mr. M. C. Pierce;

Mr. B. W. Alexander;

Mr. Roy McVey;

Mr. Theo. Knutson;

Mrs. Caroline McKeever;

Present Owners of Deschamps-
McDonald Ditch.

Dear Sir (or Madam):

By decree of the Secretary of the Interior on November 15, 1921, 35.3 acres of the Ora Deschamps allotment, which is now being irrigated by you, were declared to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 70.6 ac. ft. per annum. None of the remaining area of this allotment was declared to have a private water right from any source.

The following regulation was promulgated by the Secretary in respect to the regulation of all such decreed rights:

(Testimony of Bert Myers Nelson.)

“All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.” [545]

It is apparent that there will occur a serious shortage of water this year on all divisions of the Flathead Project which will result in considerable damage by reason of crop losses to many water users. To minimize this loss as much as possible every available drop of water must be properly utilized. In regard to these private water rights such as in this case, no greater amount of water must be diverted and used than was allowed by the Secretary nor must any other than the designated acreage be irrigated with this water.

I, as Project Engineer, have been designated by the Secretary of the Interior to act as Water Commissioner for the Flathead Indian Reservation, and I have been accordingly instructed to regulate the distribution of water among the various users under any particular ditch, and to enforce the decrees and orders of said Secretary.

(Testimony of Bert Myers Nelson.)

In line with the above, you are requested to have constructed by August 1, 1935, a suitable headgate at the point where your private ditch taps Post Creek and at some practicable place a proper measuring box, weir or other appliance for the measurement of the water flowing in your ditch which can be inspected and measurements taken by you and employees of this Service, with the purpose of determining that no more water is diverted for the irrigation of your lands than allowed, as above set forth, by the Secretary.

You will note from the above cited authorization that in the event of your refusal to comply with this request, it is my duty as such Water Commissioner not to apportion or distribute any water through your ditch. [546]

I trust that you will fully cooperate with me in this proposition. Water shortage is a serious problem with every farmer on the project. These steps are most essential to equitably distribute the available waters.

You will find this office prepared to give you all reasonable assistance.

In the event, however, that this request is ignored and no action taken by you, I shall be compelled to immediately submit this matter to our District Counsel in order that appropriate legal action may be taken against you.

Very truly yours,

/s/ HENRY GERHARZ

Project Engineer. [547]

(Testimony of Bert Myers Nelson.)

Mr. Simmons: No cross examination.

Mr. Smith: No cross examination.

Witness Excused.

THOMAS WALD,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. State your name? A. Tom Wald.

Q. And where do you live?

A. I live on Post Creek.

Q. In Lake County?

A. In Lake County, yes.

Q. You are a farmer up there?

A. I guess that's what they term it, yes.

Q. Do you own the James Waymack allotment, number 689? A. I do.

Q. And you also own the Emma M. Magee allotment, number 688? A. I do.

Q. How long have you owned those two pieces of land?

A. Why I think it is since early spring, 1917.

Q. Did you buy both of them at the same time?

A. I did.

Q. From whom?

(Testimony of Thomas Wald.)

A. Why if I recall right I think the deeds was in Mrs. Magee's name, both of them.

Q. Emma Magee? [418]

A. I think so, yes.

Q. Is she the wife of Andy Magee that testified this morning? A. She is.

Q. Well did you move upon that land?

A. I did yes.

Q. And you still own and farm the whole 160 acres? A. I do.

Q. Do you cultivate the whole 160 or do you use some of it for pasture?

A. Well I rotate as much as I can.

Q. Well is it all cultivated or do you use some for pasture land?

A. It can all be cultivated, yes, practically every inch of it.

Q. I'm asking you, have you had it all under cultivation? A. I have.

Q. And you rotate—part one year and part the next? A. Yes.

Q. Is that the way you do?

A. That is the way I try to practice it.

Q. Now under what ditch is this land located?

A. You mean private ditch?

Q. Yes? A. Magee-Minesinger Ditch.

Q. Well since 1917, during the time you have been living there, where did you get the water to irrigate this land?

A. Well the biggest part of it from the Magee-

(Testimony of Thomas Wald.)

Minesinger Ditch, although I have exchanged water with the Reclamation quite a number of times. [419]

Q. Well do you know how much water you use there actually, in irrigating this land—have you measured it, I mean?

A. I have never measured it, no, but I am supposed to be using plenty.

Q. Well do you know—have you ever measured it?

A. No I haven't.

Q. Did you ever irrigate lands before you moved upon this land?

A. No sir never have.

Q. Well where do you get the water to irrigate this land from, other than the Magee-Minesinger Ditch?

A. I don't get water from any other source, except one year, I think, the ditch washed out, and I bought some water from the Reclamation that year.

Q. Well have you ever used any water to irrigate this land from any other springs or——

A. —Yes quite a number of years.

Q. Where did you get that water from, Mr. Wald?

A. Well it empties into B Canal southeast of my place, I believe on the Garipey place, and some on the Latto place, and I think some on the George Sansome place.

Q. Is there any government canal that goes through your land?

A. Yes sir.

Q. When you—generally speaking, I mean?

(Testimony of Thomas Wald.)

A. Generally speaking, the government ditch goes from the south to the north—well it angles, it cuts 160 acres—I will use these two sections here for the 160—I would say it come in approximately up here.

Q. Where is that? [420]

A. In the southeast corner on the Waymack eighty, and it runs along in here and circles back and forth and down in this here it comes off, it cuts across the road here, I guess, and circles down around here and comes out on the northwest corner of the Emma Magee eighty at approximately the same distance from this corner here; I will say that really the biggest head of it would be below Canal C.

Q. You can see your place on the large scale map marked with the two eighties and the south eighty in pink and they are supposed to represent your two eighties?

A. Yes—well you can see that for yourself—this would be north?

Q. Yes.

A. Well then this map is wrong because it never comes below the line of that Emma Magee eighty any place.

Q. You mean this canal marked Mission, here, enters on to one of your pieces of land?

A. It comes in right through here, approximately, and goes over on to the—and it never goes below this land here.

(Testimony of Thomas Wald.)

Q. Which allotment lays to the west?

A. That is Emma Magee's.

Q. And you mean the canal never leaves that allotment until it angles through the north end?

A. No it don't.

Q. So the location of this canal is slightly off?

A. Very slightly off—it is approximately all right, though.

Q. Now where does this water rise, the spring water you were speaking of?

A. Well it is up in this section here some where.

[421]

Q. And you are pointing to about section 20?

A. Well I suppose it is up in here—it empties into this Mission feed.

Q. Well in irrigating your land do you waste any water deliberately?

A. Not deliberately, no.

Q. Well you waste some, naturally?

A. You naturally will, when you are irrigating lands——

The Court: Is water wasted when you can't prevent its going away?

Mr. Wallace: I don't know.

The Court: Neither do I.

Mr. Wallace: You can call it waste, and yet it is not a deliberate waste.

The Court: A waste, or is it a necessary loss.

Q. Is this land of yours, 160—cut up by the government ditch and by the highway?

(Testimony of Thomas Wald.)

A. It is, yes, the road runs right through the center of the two eighties.

Q. Between the two eighties?

A. Yes. And there are a lot of short slopes both ways along the road there, and a lot of different short runs on the ridges.

Q. And when you have those short runs—do you mean short runs for water?

A. For water, yes.

Q. Can you irrigate where there are short runs as easily as—or conserve the water as well, as where there are long runs for the irrigation of water?

A. No you can't; you take on the later spots, where the [422] land is left, where you have to run it approximately two hours to do much irrigating, and you are bound to have some run-off there, or quite a little, you might say.

Q. Have you ever taken any steps to conserve water up there on your land, in the vicinity of your land? A. I have.

Q. What did you do about it?

A. Well it was for years there that Mr. Crow—

Q. —And what years were those?

A. That was when I first settled in there—Mr. Crow and Mr. Moody they urged me to make use of this spring water in the spring of the year especially.

Q. Who was Mr. Crow?

A. He was the project engineer there before Mr. Moody.

(Testimony of Thomas Wald.)

Q. And then he was followed by Moody?

A. Yes sir.

Q. And what did he say you should do about conserving it?

A. He urged me to make use of that water and leave my water up in McDonald Lake, as that could be saved and stored up there while their water went to waste.

Q. Well where did you get this spring water?

A. They got three turnouts in Mission C and I used to get it through them.

Q. You take it out of the government ditch?

A. Yes.

Q. After it had gone into the government ditch?

A. Yes sir.

Q. And when you were using that water was it necessary then for you to be using your private water out of the Magee-Minesinger Ditch? [423]

A. Oh sometimes later in the year but this was mostly in the spring of the year I irrigated, I imagine, a week or ten days before the majority of people do.

Q. Well how many years did you use this spring water out of the government ditch and in the spring time and leave the water up in the Post or Lake McDonald Reservoir?

A. Why I imagine practically every year from the time Mr. Crow was engineer until Mr. Moody was transferred.

Q. Well how many years was that, Mr. Wald?

(Testimony of Thomas Wald.)

A. Well it must have been——

Q. —Well was it all one year or several years?

A. Oh quite a number of years, yes.

Q. Well while you were using that water from these springs that was being wasted into the government canal was it necessary for you to be using the water out of the Magee-Minesinger Ditch?

A. It would take the place of part of what would come out of—ordinarily come out of the Magee-Minesinger Ditch, yes.

Q. Well now then after Mr. Moody was transferred who was put in, as you remember, as project manager? A. Mr. Gerharz.

Q. Well did you use any of this waste water during the reign of Mr. Gerharz?

A. I did not.

Q. Why not?

A. Well Mr. Moody served notice on me to leave it alone.

Q. Did you ever talk to Mr. Gerharz about trying to conserve this water and use it?

A. I did; I got a letter from him—it was a very nice letter, indeed—he told me there was going to be a water [424] shortage and asked me to cooperate with them and save as much of this water as I possibly could because it was badly needed over the rest of the project; so I went and made myself acquainted with him, and I asked him if he was familiar with that part of the country out my way, and he said he wasn't, and I told him

(Testimony of Thomas Wald.)

about these springs and also told him about—that I had the practice of using a certain amount of water below C—out of C—that is, when I was irrigating, from the canal, and if it was all right with him that I could go ahead and use it, that it would be quite a saving to the rest of the project, and he told me he didn't think it could be done; he said "If you do it once you will always have to do it, and it would cause trouble;" so I told him that was all right, it wouldn't take me thirty minutes to turn in my own water, but, I said "You take a different attitude from what Mr. Moody and Mr. Crow did;" so he said "Well," he said, "if you don't like it," he said, "why don't you sell and move out."

Q. Well were you——

A. —So I told him that I had a good little wife and home and three children, and I was trying to pay for my place and make a home for them, and it wouldn't be very handy for me to move right then.

Mr. Smith: We object to any further answer along this line as not responsive.

The Court: It shows the attitude of the management, telling a man to get out of his home.

Q. Were you permitted then to use any of this spring water that was wasted into the canal, to use it on your land during the time Mr. Gerharz was manager? [425]

A. No I wasn't.

Q. Well then where did you get the water?

(Testimony of Thomas Wald.)

A. I got it out of the Magee-Minesinger Ditch.

Q. Well let me ask you—when you were irrigating from the Magee-Minesinger Ditch, or when you got through irrigating with the water from the Magee-Minesinger Ditch, did you go, then, and shut that ditch down, or would the water run all the time?

A. No I would shut it down when I got through.

Q. Do you——

A. —I imagine on an average of every ten days or so.

Q. Let me ask you one other question about the other defendants, when they were using the McDonald-Deschamps Ditch, does that water run full head continuously, or do they shut it down when they are through irrigating?

A. It seems to be shut off and on, because I go right across their ditch every time I go up there to shut mine off or open it up.

Q. Well now then when you are using water to irrigate on your east eighty, towards the mountains, east from the Mission Canal, what becomes of any waste water that gets away from you?

A. It all runs into C Canal.

Q. Well now did Mr. Sperry follow Mr. Gerharz as project engineer——

Thereupon at the hour of 12:07 o'clock p. m. of said day recess was had until 2:00 o'clock p. m. of said day, when the trial was resumed.

Q. Mr. Wald, later on, when Mr. Sperry became

(Testimony of Thomas Wald.)

the project engineer, did you have any conversation with him relative [426] to this waste spring water that was wasted in the B Canal? A. Yes I did.

Q. Briefly, what was that conversation?

A. Well I asked him if he was familiar with that part of it, and I also told him that I had had permission to take water out of C Canal, and again he said he wasn't; but however he said he would look into it very carefully and write me, but so far I haven't heard anything more of it.

Q. And from then, from the date of that conversation, until the present, have you had any permission to use this water out of C Canal?

A. No I haven't.

Q. Now do you know what becomes of this spring water that wastes in the C Canal?

A. Well in the early part of the spring why it is all wasted.

Q. What becomes of it—where is it wasted?

A. Well there is a waste gate between my place and Marion Deschamps that is usually open in the spring of the year.

Q. And is that a waste gate in the C Canal?

A. That is a waste gate in the C Canal, yes.

Q. And the water goes out of that waste gate?

A. Yes and runs through Post Creek.

Q. Tell the Court whether or not there is any portion of your land that has a gravelly subsoil?

A. Yes there is a little portion of it.

Q. Approximately how many acres would you say?

(Testimony of Thomas Wald.)

A. Oh I didn't measure it but I judge between 25—35 acres.

Q. Does that land with gravelly subsoil require more water than the balance of your land? [427]

A. Yes it does.

Q. If properly irrigated?

A. It takes a very large head to get across it, otherwise it will sink.

Q. Now what price did you pay for this 160 acres? A. I paid \$10,000.00 for it.

Q. And that was in 1917?

A. Yes that was in 1917.

Q. At that time was that figure a large price or a small price for 160 acres?

A. It was considered the largest price that had ever been paid for any land around there at that time.

Q. And what, if anything, influenced you to pay that price for that 160 acres?

A. On account of the private water rights.

Q. Did you make any investigation with reference to the private water rights?

A. Yes I did; I lived in the Valley about 15 months before I bought this place; I inquired in regard to construction charges to land, down at the Reclamation Office, and they informed me that construction charges would be between sixty and sixty-five dollars an acre, so I was trying to get away from that by buying a place with the private water rights.

(Testimony of Thomas Wald.)

Q. And the reason you purchased this land, then, you say, was on account of this private water right?

A. That was the sole reason.

Q. What understanding did you have at the time you purchased this land with reference to the free water?

A. That it had free water on it.

Cross Examination

By Mr. Simmons: [428]

Q. You say that you were familiar with your private water rights or so-called Secretarial rights at the time you purchased this land?

A. Well in a way I did; before I bought the place I employed a well educated Indian that had helped survey this Valley at the time it was surveyed; he was working for Stanley Searce at the time.

Q. What I was getting at, on the Emma M. Magee allotment, which you now own, do you know what the Secretarial right is?

A. I do now, yes.

Q. What is it?

A. It is supposed to be eighty acres.

Q. That is a right for each acre on the allotment?

A. That's what I understood for the secretarial right, for each acre-feet, yes sir.

Q. And on the James Waymack what is your Secretarial right?

A. I think 52.3 acres, if I remember right.

(Testimony of Thomas Wald.)

Q. Did you, Mr. Wald, ever attempt, at the time, to limit your diversion of the amount allocated you by the Secretary?

A. No I don't believe I have.

Cross Examination

By Mr. Smith:

Q. You say that you don't waste any water from your land that you could possibly save, is that correct? A. I try not to, yes.

Q. As a matter of fact a considerable amount of water does flow from your land into Mission C, doesn't it?

A. Yes quite a little when I irrigate above the canal.

Q. You irrigate a part of your land which lies below [429] Mission C Canal, don't you?

A. I think the biggest portion of the two eighties lies below C Canal.

Q. And whatever water is wasted from the portion lying below Mission C wouldn't go into Mission C, would it? A. No it don't.

Q. Where does it go?

A. Well it goes down the creek to Cramers and Bushmans and I guess to Hilton and Smith.

Q. They call that Poison Ivy or Poison Oak Creek? A. I wouldn't know.

Q. And do you know where that creek empties into Post Creek?

A. Well it must be right close to the highway

(Testimony of Thomas Wald.)

there, the road that runs east and south there at the Post Creek store.

Q. Now there is an east and west road between your land—there is a culvert across that road, is there not? A. Yes.

Q. And why was that culvert put in?

A. For waste water to go across the road.

Q. From where?

A. From my place—most of it comes from Mr. Pierce's eighty there.

Witness Excused.

Mr. Wallace: I would like to call Mr. Sperry for a couple of questions.

The Court: Very well.

GUY L. SPERRY

was called as a witness on behalf of the [430] defendants, and having already been duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you tell us approximately how many of these so-called Secretarial private water rights there are on the reservation?

A. There are around 300.

(Testimony of Guy L. Sperry.)

Q. It is over 300 isn't it?

A. I think it is over 300; I can't give the exact figure; it is something like that.

Q. How long is the Pablo Feed Canal Mr. Sperry?

A. Beginning from Dry Creek you mean?

Q. Yes the length?

A. It must be twenty—somewhere around twenty-six—twenty-eight miles.

Q. What is the estimated percentage of loss to the water needs now?

A. As a matter of fact there has never been anything that we could definitely determine; I would say possibly forty percent—forty-five percent; it is a figure that is practically impossible to determine; there is a considerable loss, at any rate, that is, for the amount; if you take the water at the beginning of it and run it clear through of course there will be a lesser loss; the farther up the line you get the more seep.

Mr. Simmons: If the Court please I would like to ask Mr. Sperry a question, for the record, upon a matter with regard to the James Waymack allotment, at this time.

The Court: On your own case or on cross? [431]

Mr. Simmons: It is on cross; that is, it is in answer to certain questions the Court asked me in regard to Plaintiff's Exhibit 10, wherein the exhibit sets forth that very little of this land, in fact less than an acre and a half was irrigated in 1914, and

(Testimony of Guy L. Sperry.)

The witness testified it was practically the entire eighty, was irrigated; I can do it now or later, as the Court wishes.

The Court: It isn't cross examination at this time?

Mr. Simmons: No it isn't cross, it is really rebuttal.

Cross Examination

By Mr. Simmons:

Q. In giving the figures forty-five—forty to forty-five—loss in the Pablo Feed Canal does that mean that would be the loss of water which was turned in at Dry Creek and uniformly runs north to the Pablo Reservoir?

A. That's right.

Q. Other streams come into the Pablo Feed Canal between Dry Creek and the Pablo Reservoir?

A. Numerous streams, yes.

Q. And as those streams go north would the amount of loss on them tend to diminish as the distance to the Pablo Feed Canal?

A. The loss in those streams would be correspondingly less as they approach the Pablo Reservoir.

Q. And it is for that reason that it is rather difficult to make any real estimate of the total amount, or the total percentage of loss in that water carried in the Pablo Feeder?

A. It is impossible without very extensive and very expensive investigation, because of the fact

(Testimony of Guy L. Sperry.)

that water being put in the canal there is run out of the canal—there are diver- [432] sions from the canal, water turned down to some of the streams, and there are springs along the canal, so that it is all but impossible to get an average loss in the Pablo Feed Canal.

The Court: What causes that loss?

The Witness: The loss in seepage; in any soil where the ground is at all porous there is quite a lot of the water goes in the ground; in the course of the number of miles there is a lot of water sinks down into the subsoil and is completely lost; the evaporation accounts for some, in extremely hot weather, and all ditches do suffer a greater or smaller percentage of loss.

The Court: Yes but is it usual for it to be forty or forty-five percent of loss?

The Witness: It isn't extremely uncommon at all, water that is transported 20 miles or 25 miles, it is very common, and maybe more than that in many ditches.

The Court: Could that water be saved if it were used nearer the point of origin?

The Witness: A considerably larger amount could be.

The Court: What is the need for transporting it the distance it is carried?

The Witness: The need for transporting it in this case is to take the water from the source of largest supply to the source of smaller supply.

(Testimony of Guy L. Sperry.)

The Court: That is, the land closer to the source of supply, needing irrigation, could use it all?

The Witness: No sir they couldn't use it all.

The Court: Could they use a considerable quantity—say fifty-five percent? [433]

The Witness: They could use fifty-five percent, possibly, in the course of quite a few miles, but not just close to the source; there would be a pretty good mileage before they could.

The Court: Any further questions?

Cross Examination

By Mr. Smith:

Q. Is it your practice to use the water—take the water to the lands from the closest source of supply?

A. That's right, the closest available source of supply.

Witness Excused.

J. D. PHILLIPS

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name?

A. J. D. Phillips.

(Testimony of J. D. Phillips.)

Q. And where do you live?

A. Saint Ignatius, Montana.

Q. For how long have you lived there?

A. Twenty-eight years.

Q. You live on a ranch? A. Yes sir.

Q. You operate that ranch? A. Yes sir.

Q. Have you had any experience in the use of irrigating waters? [434] A. Yes sir.

Q. How long have you had experience in using water—irrigating water?

A. Well I have had experience the last 39 years.

Q. Where did you use irrigation water prior to your coming to the reservation?

A. My first experience was on Shields River.

Q. Where is that?

A. Eastern Montana—empties into the Yellowstone near Livingston. Next, in the Bitter Root Valley.

Q. And that is south of Missoula?

A. Yes sir.

Q. And then where?

A. Next on the reservation.

Q. And has that experience of 39 years, of yours, been continuous?

A. It was about four or five years during that time that I wasn't farming.

Q. Aside from that four or five years——

A. ——Yes, four or five years during the 39.

Q. The nature of it——

(Testimony of J. D. Phillips.)

A. ——That is, extensively—I used some water, but it was on small tracts.

Q. You have used water extensively for irrigating purposes for approximately 39 years, with the exception of four or five years, is that right?

A. Yes.

Q. Now you own a ranch on the reservation?

A. I am trying to pay for one there.

Q. Now where is your ranch located with respect to the [435] defendants' lands?

A. It is about two miles or a little better, south.

Q. Well are you acquainted with the defendants' lands? A. Yes sir.

Q. Have you been on those lands?

A. Yes sir.

Q. Once or twice, or many occasions?

A. Well some of them I have been on quite a few times; I put up hay on some of them; some of them I haven't been on so much of late years.

Q. Well let me ask you, is your ranch about the same character of soil as the ranches of the defendants? A. Practically so.

Q. Are you about as close to the mountains as they are? A. Yes sir.

Q. Now what, if you know, what has been the largest amount of water that you have been able to use on your land, Mr. Phillips, in acre feet, if you know?

A. Well in the good old days——

Q. ——When was that?

(Testimony of J. D. Phillips.)

A. That was in the "teens", 19—and—well I will say possibly '19, the best was, immediately after they put in the A Canal, I used the most water.

Q. And how much had you then—how much did you use?

A. Well if I remember right, according to one of the project engineers, Mr. Engels—, he was there a number of times and measured the water—I think the record will show that I have got as high as four acre-feet from the land—I mean from the project.

Q. And did you use all of that four acres?

[436]

A. Yes sir.

Q. Did you ever use any other water at that time? A. I used the private water too.

Q. Had you some private water?

A. Yes sir.

Q. How much?

A. Well I think the Secretarial rights claimed 40 acres.

Q. And how many acre-feet?

A. Two acre-feet I believe.

Q. And did you use that two acre-feet?

A. Yes sir.

Q. At the same time you were using the four acre-feet from the government ditch?

A. Yes.

Q. On the same land? A. Yes sir.

Q. You mean to tell us you have used as high as six acre-feet then?

(Testimony of J. D. Phillips.)

A. Well I think Mr. Engel said I had used seven acre-feet.

Q. Well when you——

A. ——There was nobody using much water in there and there was lots of it and I used my own water and all the water I could get out of the canal.

Q. Well when you used that seven acre-feet, or thereabouts, what kind of crops did you raise?

A. I had dandy crops.

Q. And could you use all of that water beneficially without wasting any of it?

A. Yes sir—I will modify that to a certain extent—we wasn't as careful then about wasting water as we have been [437] in the last several years, owing to the fact that there was plenty of it and no one was using it—I say very few were using it.

Q. Do you know how much water you have been using on your ranch during the past four or five years, Mr. Phillips?

A. Well it was—now when I said this here about so much water, that there was land that I had leased, because my own land, I didn't use any of the project water on that: this here all was leased, that land right below me.

Q. Joins you? A. Yes sir.

Q. During the past four or five years how much water have you used in irrigating that land?

A. Oh that there it runs from possibly a little less than two feet up to as high as three, maybe.

(Testimony of J. D. Phillips.)

Q. Can you use three feet of water beneficially on your land without wasting it?

A. Yes and a whole lot more.

Q. You could? A. Yes sir.

Q. Tell the Court how much water, Mr. Phillips, that you could use on your land, beneficially, without wasting it any more than the natural waste?

A. Well I don't think that I can work that place—now you understand the full 160 acres, that is the ground I am speaking of?

Q. Yes.

A. Keep it green, from the time I got the seed started, until fall, with less than four feet.

Q. Four acre-feet? [438]

A. Four acre-feet—that would be very—you would have to be very careful.

Q. Mr. Phillips is it possible to irrigate a ranch such as yours, or any similar ranch, without wasting some water?

A. No, not if you are irrigating it all.

Q. Why is that?

A. Well what are you going to do when you get to the lower——

Q. ——Tell me?

A. Well when you get to the lower end of your farm, if you are irrigating that, some of the land you have got to soak it up, and some will run off in spite of it.

Q. It isn't of course—or is it possible to pick

(Testimony of J. D. Phillips.)

that water up and take it back up to the high land?

A. No you can't run water up hill.

Q. So there is some natural waste even though you are careful?

A. Well as far as that particular land is concerned it is gone off that but it isn't wasted, they got a canal below that they pick it up, and I don't consider that it is wasted.

Q. Well now are you familiar enough with the lands of the defendants to state generally, Mr. Phillips, what, in your opinion—or what amount of water their lands require to properly irrigate them?

A. Well of course they have some places over in among the defendants that is seeping land, dry, that has a subsoil that when the top soil gets wet the water will run along on the subsoil and come up, they have some of that that this other land that I speak of don't have—outside of that why it is practically the same. [439]

Q. Practically the same as what?

A. As my land.

Q. And what then, will you say, generally speaking, what does the land—what amount of water does the land of the defendants require for proper irrigation?

A. I don't think they could keep the ground, the stuff green on it throughout the growing season for much less than four acre-feet.

(Testimony of J. D. Phillips.)

Q. And is it good practice and policy for farmers to keep their pasture and land green?

A. Well your pasture is the most important part of your farm and any time you let your ground burn it hurts it, in fact in the good old days when there was lots of water the project used to encourage the people to irrigate their stuff until after the grain was off—and why not—the stuff will grow up, and you can easily use that for a turn-out as a fattener or the stock put into it, and we used to do that—we didn't have so many wild oats, either—that has a tendency; anything that grows in good moisture will grow where it is irrigated—the ground is ready for the next spring, you plough your ground and put your crop in and it is much better.

Mr. Simmons: No cross examination.

Cross Examination

By Mr. Smith:

Q. How many acres of your land are under the project system?

A. Well I have 70—it used to be 78 acres—I believe the record shows now 72 or 74 and some tenths.

Q. Seventy-five, approximately, acres under the project system? [440]

A. Yes.

Q. How much water, if you know, was delivered for an acre-foot, per acre, for that 75 acres, last year?

A. Well last year we might not have used—I

(Testimony of J. D. Phillips.)

think it was two foot, last year, and there was 40—about 40 acres that was summer fallowed.

Q. So there you used two acre-feet per acre, or 150 acre-feet, on 35 acres of land, is that right?

A. How is that?

Q. You say you have 75 acres under the project system?

A. Yes sir.

Q. And last year you summer fallowed 40 acres?

A. I think the soil conservation showed something like 40 acres.

Q. So you actually cultivated and raised crops on 35 acres?

A. Yes sir.

Q. And you had delivered to you under the project system 150 acre-feet of water?

A. Well if my memory serves me right I didn't get to use quite all of it; I might have but I wouldn't say, but it was practically all.

Q. And so far as your best recollection goes then you used all of that water on 35 acres?

A. Yes sir.

Q. Now then in addition to that land you have some land with the so-called private rights?

A. Yes sir.

Q. And where does that land lie?

A. Well that lies south of this other land about a mile.

Q. And out of what stream or ditch do you get the water [441] for the private?

A. Well that is called Dry Creek or sometimes Ashley Creek.

Q. And how many acres did you irrigate with the waters from that stream?

(Testimony of J. D. Phillips.)

A. Well I irrigated about 200 acres.

Q. And how much water did you get out of that, do you know?

A. Well it would be more or less of an estimate, I didn't measure it—no measuring device.

Q. Do you think you are capable of estimating it with a reasonable degree of accuracy?

A. Yes sir.

Q. How much is your estimate?

A. Well the way I would estimate that, the time I irrigated it—however, I didn't do much of the irrigating last year—haven't the last few years been as actively irrigating as in earlier years—my boy irrigated it; when I irrigate that, every time I irrigate it takes about six inches—that would be probably 250 acre-feet.

Q. You used 250 acre-feet for 200 acres down there, then?

A. Something like that.

Q. And what kind of crops did you produce on the 35 acres that you were irrigating out of the project system?

A. Well that there was in timothy and alsike, and I cut that for seed.

Q. Did it make a good crop?

A. Yes sir.

Q. Would it have made a bigger crop if you had had more water?

A. No I don't think it would last year because that's [442] about all you can get when you use it

(Testimony of J. D. Phillips.)

for seed—that there ripens in July—I done very well last year.

Q. So you used that 150 acre-feet of water on that 35 acres, up to about July?

A. No I had water the whole season.

Q. Now then what kind of crops did you raise on the 200 acres you have got under the private ditch?

A. Well I also used some project water from the project on that too.

Q. How much of that 200 acres?

A. Well I don't use any of that on the crop—I used that after the crop was cut—I had a good crop.

Q. You had a good crop on the 200 acres under your private ditch? A. Yes sir.

Q. And you brought that up on irrigation with water from the private ditch, is that right?

A. Yes.

Witness Excused.

GEORGE H. BECKWITH

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. What is your name?

A. George H. Beckwith.

(Testimony of George H. Beckwith.)

Q. How old are you? A. Sixty-eight.

[443]

Q. And when did you first come to Western Montana? A. 1886.

Q. And have you been in Western Montana ever since then? A. Yes sir.

Q. Where did you come to when you first came to Montana? A. Missoula.

Q. How long were you located in Missoula?

A. Sixteen years.

Q. Where did you go to then?

A. Went to Saint Ignatius.

Q. That is up on the former Flathead Indian Reservation? A. Yes.

Q. That was—— A. ——1902.

Q. Have you been located at Saint Ignatius ever since 1902? A. Yes.

Q. What kind of business have you been in?

A. In the mercantile business; I was first there as a licensed Indian trader.

Q. By whom were you licensed?

A. By the Commissioner of Indian Affairs.

Q. And you established a store there did you?

A. Yes sir.

Q. And was that store then succeeded by your own store—I mean——

A. ——I bought out a business there and operated under my own name until 1910, and then under the name of the Beckwith Mercantile Company since then.

Q. Are you acquainted with Charles Sanders?

(Testimony of George H. Beckwith.)

A. Yes sir. [444]

Q. I will ask you if you had any business dealings with him?

A. Well in 1904, on September first, Charley Sanders opened an account with me, that was open until October tenth that same year; during that time he traded with me and bought powder and supplies of various kinds, and on October 18th the account was paid by Joseph Deschamps; together with Mr. Sanders, I had occasion to look that up in my old records, and I found that that was the case.

Q. You still have the records? A. Yes.

Q. And they are available in the court now?

A. Yes.

Q. Did you know the Deschamps and the McDonalds? A. Yes.

Q. Did you know what Mr. Sanders was doing at the time he was running this account with you?

A. No, only that he was doing some work for Mr. Deschamps.

Q. Did you ever visit or go upon the reservation prior to the time you went there to locate in 1902?

A. Yes I had been there several times, after I came to Missoula.

Q. About what year did you first go up on the reservation?

A. Why I know I was there in '93; I was previous to that, too—I was there in the '90's—in the late '80's.

(Testimony of George H. Beckwith.)

Q. Now when you were there did you go through the Jocko Valley? A. Yes.

Q. And any further up on the reservation?

A. Yes we was up to Polson and across the lake on the boat, and then I camped, summer camped on Flathead Lake in the [445] '90's, one year.

Q. On these first trips, Mr. Beckwith, before you located on the reservation, what did you notice about the Indians—were there any Indians there?

A. Yes, the Indians had homes along the creeks and along the mountains, practically all their homes were close to wood and water, and there were no farms out from the creeks or from the mountains—the prairie land was all open range.

Q. Well when you located on the reservation in 1902 what condition did you find the Indians in—I mean by that, were they still located along the creeks? A. Along the creeks.

Q. And what if anything were they doing with respect to farming?

A. They were engaged in stock raising, and quite a few of the big Indians that were farming grain and hay and pasture.

Q. Any of them using any water to irrigate with?

A. Yes a few; the Deschamps and the McDonalds had a ditch out of Post Creek, as I remember, and they were using it in a small way, but later they were advised by the superintendent to file any water rights that they had, and I remember Mr. Bel-

(Testimony of George H. Beckwith.)

lew was the Indian Agent at that time, about that time, soon after I went there, and——

Mr. Smith: May I interrupt you just a moment—did you hear the conversation between Mr. Bellew and the various Indians with whom he had dealings?

The Witness: Well I did hear they were written—and how I come to know about it, I happened to be a notary public and many of them brought their filings—the filings were [446] prepared mostly in the Agent's office—and were brought to me to be acknowledged before me; and at that time a number of them took out ditches and filed on the water.

Q. Were you here in Western Montana at the time that the Flathead Indians were moved on to the Flathead Reservation?

A. I was in Western Montana; I remember the time that the Army officials moved quite a number of Indians through Missoula to the Flathead.

Q. Is it a fact, Mr. Beckwith, that the Flathead Indians were rather slow to move upon the Flathead Reservation, subsequent to the Treaty of '52?

A. Yes many of them objected to leaving the Bitter Root, and some, as I remember it, left and went on to the Flathead; others refused to go until they were moved by the Army, by order of the United States Army.

Q. And about when was it they were moved?

A. Well I don't remember the date but it was, as I recollect it, it was somewhere near the—after 1890.

(Testimony of George H. Beckwith.)

Q. It was subsequent to the time you came here in 1886? A. Yes.

Q. At the time you went on to the reservation the Jesuit Fathers had a mission there?

A. Yes they had a quite an extensive farm, the Sisters of Providence and the Jesuit Fathers and the Ursuline Nuns, and all of them had private ditches and they irrigated considerably.

Q. And did any of those organizations or orders have a mill?

A. Yes they had a flour mill; they ground for themselves and also custom grinding for the Indians.

[447]

Q. And did they do custom grinding?

A. Yes.

Mr. Simmons: No cross examination.

Cross Examination

By Mr. Smith:

Q. I understood you to say that most of the irrigating was done by Breeds, is that correct?

A. Well the Breeds owned the farm and some white men that were married in the Tribe, and I don't remember seeing many Indians—full blood Indians—irrigating.

Q. Would you say that most of the irrigation, the early irrigation development on the Flathead, came about, or was participated in by white men?

A. Well I would say that it was white men and mixed bloods.

Witness Excused.

REVEREND FATHER LOUIS Taelman

was called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wallace:

Q. What is your name, Father?

A. Reverend Taelman.

Q. And what is your work—what work are you now engaged in?

A. Missionary work among the Flathead Indians.

Q. On the Former Flathead Indian Reservation?

A. Yes.

Q. What order do you represent or belong to?

A. I belong to the ministry, but the Society of Jesus, it [448] is called.

Q. Also known as the Jesuit Fathers?

A. S. J.—Jesuit Fathers.

Q. You have been on the reservation a long time?

A. I have.

Q. When did you first go there, Father?

A. In 1890.

Q. And in what capacity did you go there then?

A. At that time I was just as a visitor, for a couple of months previous to my appointment as professor at Gonzaga College, and my first impression with the Fathers for two months.

Q. Then you left the reservation for a while?

A. I came back in 1893 and was here for two years—'93 to '95.

Q. And did you go away again?

(Testimony of Reverend Father Louis Taelman.)

A. No I left to make my higher studies, then, of theology, and I was at the Mission again from 1898 to 1899, two years.

Q. During one of these times when you were absent from Saint Ignatius were you then president of Gonzaga College, Spokane? A. Yes.

Q. Were you president of that college there during the time that Judge Webster was at the head of the law department?

A. He was the prime mover of the law department which I initiated.

Q. Then you returned to the reservation to remain permanently?

A. I was here on the reservation previous—I went to Spokane, from 1905 to 1909, and I became president of Gonzaga [449] in 1909; I held until 1913.

Q. Well since that time you have been continuously on the reservation?

A. I have been there continuously the last 16 years, having been 15 years on the Crow Reservation.

Q. And during the time you have been on the Flathead Reservation you have been working as a missionary among the Indians? A. Yes.

Q. Just doing what, Father, as a missionary—what are your duties?

A. Why Divine service on Sundays, holidays and other days, visiting the sick, traveling around and getting acquainted more and more with the families

(Testimony of Reverend Father Louis Taelman.)
throughout the reservation; I used to travel around with my team in the early days, both through the Valley and up on the River and around Elmo, or throughout the whole reservation.

Q. And you visited quite extensively, did you, among the Indians, in the early days?

A. I did, quite a bit, and I was superior, practically, from 1905 to 1909.

Q. Tell the Court, when you first went up on the reservation during the first year, where did you find the Indians located?

A. They were located as Mr. Beckwith says, along the mountains and along the streams—they looked for water and wood.

Q. They wanted to get close to the wood and water? A. Yes.

Q. And in those early years did you find any of the Indians using water to irrigate?

A. Some did; they all had their—practically all, had [450] their own private little settlements and with their homes and their little enclosed lands for their ponies and stock, and irrigated some of the land, and all of them.

Q. Were they getting away from running around, and were they settling down?

A. Yes they were settling down from their nomadic life; the intention of course, of the government and of the agent, was to encourage them to settle down with their private homes and develop

(Testimony of Reverend Father Louis Taelman.)
their little lands that they had selected, and make a living on their lands.

Q. Did these Indians select homesites and sites for their private homes prior to the time the government gave them specific allotments?

A. Well they practically all had their own little selected lands, previous to the official allotment of the government.

Q. What did they do with these selected sites?

A. When I was there, when Major Rankin made the allotments, in fact I believe the sixth of July, 1906, between him and myself we made out all the allotments for the members, and I was there during that period of time when the allotments were made, and of course his plan, as I knew at the time, was to let the Indians stay on the settlement that he had selected, the only difficulty being at times to allot upon the lands according to the survey that had to be made, but as much as possible they all retained their original allotment, particularly the fathers of the families, but I presume it would not stand otherwise.

Q. Who at that time was superintendent of the Flathead Agency?

A. In 1900 it was—I came first as long ago as Major Ronan—— [451]

Q. Did you mention Major Rankin?

A. He was the agent appointed by the government to make the allotments; I had quite a few talks with him, and I remember in looking over the his-

(Testimony of Reverend Father Louis Taelman.)
tory of the Mission, it was on the 6th of July, 1906,
that we settled the lands for our own property.

Q. The Jesuit Fathers, the Ursuline Nuns and
the Sisters of Providence were all allotted those
lands near Saint Ignatius? A. Yes.

Q. Where the Mission stood? A. Yes.

Q. When you first went there did the Jesuit
Fathers have a mill to grind grain? A. Yes.

Q. Do you know when it was that the Jesuit
Fathers first located there?

A. In 1854 on the 24th of September.

Q. And when you came there they had this mill?

A. Oh yes.

Q. And for what purpose?

A. We used the mill for to convert wheat into
flour for the use of the institution; at times for the
benefit of the Indians; besides that we had also a
sawmill and planing mill to help along in construc-
tion to make houses for the Indians.

Q. And did the Jesuit Fathers actually saw lum-
ber for the Indians? A. We did.

Q. With which to construct their homes?

A. Some of the homes—they came to get lumber.

Q. And ground their grain for them?

A. Yes. [452]

Q. This grain was raised from each individual
Indian?

A. Small quantities—that was sufficient, for
many purposes.

(Testimony of Reverend Father Louis Taelman.)

Q. Tell the Court, Father, what encouragement, if any, was given to the Indians to use the waters upon the reservation for irrigation purposes?

A. Well, the several Indians, to some extent, were acquainted with the Treaty of 1855, because it was essential to them, and they knew that by virtue of that Treaty and by the terms present in the Treaty, they were encouraged to make selections for individual homes and settle down and develop their homes and become self-supporting, to some extent; then from my knowledge, in the years I have been on the reservation I have accordingly always encouraged the Indians to settle down and fence in their little allotment, private allotments that they had selected, and develop them to the best of their ability; Major Ronan did a great deal of that around Arlee, around the old Jocko Agency, where the Indians were encouraged to build ditches and dams and bring the water to their respective settlements in that country.

Q. As a matter of fact the history shows that in about the eighties—'eighty-six, the government helped the Indians build a ditch in the Jocko Valley, didn't they?

A. I wasn't here at the time.

Q. Was there a ditch there when you came here, in the Jocko Valley?

A. At the date I came here there was, in 1890, and they used it—, as far as I remember.

Q. What about yourself and the other mission-

(Testimony of Reverend Father Louis Taelman.)
aries—did you encourage the Indians to use this water for irrigation?

A. We were always combining the two things, spiritual work [453] for their souls and the natural physical development for their families, and we knew that for them that was very important.

Q. As a matter of fact the Jesuit Fathers worked in quite close cooperation with the various Indian agents, did you not? A. We did.

Q. And in encouraging the Indians to settle down and to use water for irrigation purposes?

A. We did.

Q. How did these Indians in those days consider their home sites and their own property, Father—what were they led to believe by the Missionaries and by the Indian agents?

A. They knew that, of course—they didn't know very distinctly about the ownership of the lands or the use—but in their own Indian ways they said, "This is our land—this is our reservation, as against anything from the outside," and we deemed it their reservation and their own private allotments, of settlement, and it was respected by the chiefs, who had their own settlements individually, and by the whole tribe, and it was sided in with in the encouragement of the government and of the agents, that the Indians were peacefully settled and peacefully in possession of their own private allotments and in the peaceful possession of their lands so that nothing would disturb them.

Mr. Simmons: No cross examination.

(Testimony of Reverend Father Louis Taelman.)

Cross Examination

By Mr. Smith:

Q. What would you say, Father, as to whether the white persons and the persons of mixed blood were among the more progressive irrigators in the early development of the reserva- [454] tion?

A. You're right.

Q. That is, is it true that those Indians who had white blood or those Indians who had white connections such as a white husband or something of that sort, were the ones who, for the most part, took advantage of the natural resources which were there?

A. I believe that is right. Of course quite a few full bloods had their own water rights and their own series of ditches but the majority of the irrigation work I believe was carried on by the breeds.

Witness Excused.

Mr. Wallace: At this time, may it please the Court, I would like to ask counsel for the government and for the interveners to stipulate with me that the deeds by which the various defendants in this action acquired their respective lands were and are the ordinary form of warranty deed, and that those deeds provide that the defendants acquired the lands with whatever hereditaments and tenements may have been appertaining to the land at the time of their respective purchases.

Mr. Smith: The interveners will stipulate and agree that the lands were conveyed by the ordinary warranty deeds containing the provisions for the appurtenances, without, however, agreeing, as a matter of law, or anything of that sort, that the deeds from the Indians to the whites carried any rights which they may have had. We agree, then, as to what was done, but we do not of course wish to bind ourselves as to the status of these particular deeds—had any [455] particular legal status.

Mr. Simmons: The plaintiff does not consider it necessary to enter into such a stipulation; in view of the law we are invading the province of the Court.

The Court: In this connection, if I recall, it might be well for the defendants to produce their deeds.

Mr. Wallace: Well I didn't discover, your Honor, that there was a denial of the fact that they were warranty deeds, in time to file the reply—that the lands were conveyed to the respective defendants and that they now own them—there is a denial in the reply that any appurtenances were transferred with the deed.

Mr. Simmons: Well we have pleaded in our bill, if the Court please, that the defendants are—own and have control of the lands in question; there is simply no dispute of ownership, on our part.

Mr. Wallace: Are you willing to stipulate that the defendants do stand in the shoes of their predecessors—Indian predecessors?

Mr. Simmons: Well I don't think it is necessary; I think it is invading the province of the Court.

The Court: The question is are you willing to do it?

Mr. Simmons: No, we will stipulate just as far as the attorneys for the interveners stipulated.

Mr. Smith: I will stipulate that the defendants are the present owners of the lands and that the deeds by which they received the property contains the words "Together with any and all hereditaments and appurtenances."

Mr. Simmons: We will enter into the same stipulation.

Mr. Wallace: That is agreeable. [456]

And thereupon counsel for the defendants announced the

Defendants Rest.

And thereupon the following evidence was introduced by the plaintiff in rebuttal:

GUY L. SPERRY

was called in rebuttal on behalf of the plaintiff and having been heretofore duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Mr. Sperry, during the summer of 1910 did you as an employee of the United States, survey the

(Testimony of Guy L. Sperry.)

W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 17, Township 19 North, Range 19 West, known as the James Waymack allotment 689, and referred to in Plaintiff's Exhibits numbers 8 and 10?

A. I surveyed the lands under this ditch, any lands that were irrigable, under the ditch at that time.

Q. I will ask you this, Mr. Sperry—how many acres, if any, did you find were being irrigated?

A. I found there was no land being irrigated at that time in this particular tract.

Q. Did you find any evidences there of previous irrigation?

A. Not on this particular tract of land.

Cross Examination

By Mr. Wallace:

Q. Was this survey that you made the same survey that is referred to in the exhibits that have been introduced by the government?

A. No sir this was an earlier survey. [457]

Q. Oh——

A. ——This was a survey that was made in 1910.

Q. You say there were no lands being irrigated in 1910? A. On the Waymack allotment?

Q. On the Waymack allotment?

A. That's right.

Q. And what did you say about evidence of previous irrigation?

(Testimony of Guy L. Sperry.)

A. No evidence of previous irrigation.

Q. Of course there may have been some of this Waymack land irrigated in previous years, that had been ploughed up on it?

A. Well there is a possibility for some—it was during the summer—no evidence in that particular year, I couldn't say that there hadn't previously been but there was no evidence of it.

Redirect Examination

By Mr. Simmons:

Q. Did you go on this land at any later time with the committee appointed by the Secretary, to investigate these private water rights?

A. No sir I wasn't with this committee that adjudicated the water rights.

Witness Excused.

Mr. Simmons: That's all we have in the way of rebuttal.

Plaintiff Rests.

Mr. Smith: I will call Mr. Mountjoy.

And thereupon the following evidence was introduced by [458] the interveners in rebuttal:

WILEY G. MOUNTJOY

was called by the interveners in rebuttal, and having been heretofore duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. You are same Mr. Mountjoy who has previously testified in this case, are you not?

A. I am.

Q. Are you acquainted with the lands known as the Wald lands? A. I am.

Q. And are you acquainted with Mr. Wald's methods of irrigation?

A. Reasonably well, yes.

Q. Have you seen the Wald land at times when Mr. Wald was irrigating thereon? A. Yes.

Q. What have you to say as to whether Mr. Wald wastes any water in the irrigation of his land?

Mr. Wallace: Objected to on the ground that it is not rebuttal and is repetition, all gone into on direct.

Mr. Smith: It is for the purpose of rebutting Mr. Wald.

The Court: Well you suggested that you have proved that there is a waste of water.

Mr. Smith: Well——

The Court: If you have, why there is no need of going further. [459]

Mr. Smith: Well the thing I have in mind, if your Honor please, is that the taking of water by

(Testimony of Wiley G. Mountjoy.)

these defendants at periods when the project management does not know about it, causes a waste, regardless of whether they take more water than they can actually use to irrigate their land; I now propose to prove that they do actually—that Mr. Wald does actually take more water than is necessary to irrigate his land.

The Court: Well you have the testimony of a number of witnesses that the taking of water at unexpected times will cause a waste, because the head is cut, and the land is not irrigated; you also produced testimony to show that if unexpected water is added it runs to waste because there is no way in which it can be used, on approximately 24 hours notice.

Mr. Smith: Yes that is right; now I wish to show not that the ultimate taking of water causes waste but that there is actually a greater use of water by Mr. Wald—that he uses more water than he needs to use, regardless of when he takes it or how often he takes it; that is the purpose I have in examining this witness, and I feel that it is competent, in view of Mr. Wald's testimony that he didn't waste any water.

The Court: Well it is merely his opinion as to whether there is or not there is a waste; he can tell you what occurred and how it was done and whether it is in the usual practice, and then the Court will decide as to whether there was any waste of water.

(Testimony of Wiley G. Mountjoy.)

Q. (read by Reporter) What have you to say as to whether Mr. Wald wastes any water in the irrigation of his land? [460]

The Court: I sustain the objection to the present question.

Q. What have you to say, Mr. Mountjoy, as to whether or not Mr. Wald used a greater quantity of water in the irrigation of his land than was beneficial and economical?

A. Yes I believe he does; his land is of a heavy nature, and as he himself stated, takes some time for the water to penetrate; he runs a very large head of water over that land; consequently he has a very large wastage from the covering of his land.

Q. You told before about water running in Mission Feed Canal; does the water from Mr. Wald's land go anywhere else?

A. When Mr. Wald irrigates the portion of his land below C Canal his waste water does not reach Mission C, it runs into Poison Oak Creek—or Ivy to Poison Oak Creek, and from there to Post Creek below his diversion.

Q. Were you the watermaster in the vicinity of the Wald land at the time the culvert was placed in the east and west road that runs past his land?

A. I was not there at the time the culverts were placed but——

The Court: That is all, then, on that line.

Mr. Smith: That's all, Mr. Mountjoy.

(Testimony of Wiley G. Mountjoy.)

The Court: Any cross?

Mr. Wallace: No, thank you.

Mr. Simmons: No.

Witness Excused.

BERT MYERS NELSON,

one of the defendants, was called [461] in rebuttal on behalf of the interveners, and having been already duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. You are the same Bert Nelson who testified this morning are you not? A. I am.

Q. Are you a road commissioner?

A. I was until last April.

Q. And where were you a road commissioner?

A. On the lower end of Lake County, lower third.

Q. And did your jurisdiction as road commissioner extend over the roads near the Thomas Wald land? A. They crossed Tom Wald's land.

Q. Do you know whether or not a culvert was placed by the county in the east and west road running by the Wald land?

A. The Feed Canal, yes, main ditch where it crosses the road; that wasn't on Tom Wald's land, that is before it gets into Tom Wald's land; that is at the Minesinger land.

(Testimony of Bert Myers Nelson.)

Q. Now below the Wald land was there a culvert placed across the road?

A. There were two.

Q. And what is the purpose of those culverts?

A. Well they just take care of the waste water.

Q. Why do they just take care of the waste water?

A. The culverts that were there originally, they were not large enough.

Q. And do you know where that waste water comes from?

A. Well I don't know where it comes from, whether it comes from McDonald Lake ditch or Reclamation water. [462]

Q. But you know there is considerable waste water there? A. Yes.

The Court: Will you kindly tell me what waste water is?

Q. What is——

The Court: We have waste water all over Montana; it runs down the mountain slopes and causes floods; it is Nature's process of carrying away snows and rains.

Witness Excused.

Mr. Smith: I would like to recall Mr. Mountjoy.

WILEY G. MOUNTJOY,

a witness on intervener's rebuttal, was recalled and testified as follows:

Direct Examination

(continued)

By Mr. Smith:

Q. Are you at the present time acquainted with the culverts which are run across the east and west road going by the Wald lands?

A. I am acquainted with the fact that they are there, yes sir.

Q. And have you seen them?

A. Yes I have seen them.

Q. Have you ever seen water running through those culverts? A. Yes.

Q. And from what direction does that water come?

A. It comes from—well in the spring of the year, naturally, it comes from runoffs, which is the melting of snows or the running off of rain; later in the season the water [463] comes from irrigation and is what we would term waste water, inasmuch as it is not beneficially used on the land, and allowed to seep.

Q. Is it true, Mr. Mountjoy, that any farmer irrigating must necessarily lose a certain percentage of the water which he carries across his land?

A. In certain types of soil it is theoretical; on our looser soils there should be no waste, theoretic-

(Testimony of Wiley G. Mountjoy.)

cally; I believe there will be some waste in any ditch.

Q. Now then having in mind the character of the Wald soil, the amounts of water which you have seen flowing through these culverts, and the amounts of water necessary to properly irrigate the Wald land, could you tell us, in your opinion, whether or not the amounts of water flowing through those culverts represent an unreasonable percentage of waste water? A. Extremely.

The Court: Mr. Mountjoy do you mean by that, water running through these culverts came from the Wald land?

The Witness: Yes it must have come from the Wald land.

The Court: And spring run-off because of heavy rains?

The Witness: In the spring of the year, yes, but not during the irrigation season, or at least not to any extent during the irrigation season.

Q. How close is this culvert to the Wald land?

A. Well one of them lays between his two eighties and the other is across the road directly below his eighty.

Q. And approximately how far in feet from his land would that be?

A. Well I suppose either—— [464]

The Court: You can't deal in suppositions; if you know, approximate the distance; if you can't do that, say it is impossible.

(Testimony of Wiley G. Mountjoy.)

The Witness: Either one would be 15—18 feet from his land, I would judge.

Q. And are there any springs or subsurface waters that rise and flow into these culverts?

A. Not to my knowledge.

Q. Do you know the general configuration of the Wald land as it leads out from these culverts?

A. Yes.

Q. And when water comes into these culverts do you know where it comes from—from what part of the surface of the land around the culverts

A. Well it all comes from surface water, from the flooding of his land, the irrigation water.

Q. From the flooding of whose land?

A. Mr. Wald's land.

Q. Now then can you tell me how much water you have seen flowing through the culverts, which, to your knowledge, came from the Wald land?

A. Through the individual culverts?

Q. Yes.

Mr. Wallace: We object to that, may it please the Court, unless it be shown that this is waste water, and water that Tom Wald actually wasted.

Q. Well in the summer time, Mr. Mountjoy, is there any spring run-off running from the——

The Court: Well we will assume that there isn't any, though the heaviest run-off, as I understand it, in many [465] cases comes in June.

Q. During the time, Mr. Mountjoy, when the farmers are irrigating their land in the neighbor-

(Testimony of Wiley G. Mountjoy.)

hood of the Wald land, is there any spring runoff?

A. No—you mean from springs or from melting snows?

Q. No I mean from melting snows?

A. There is none that reaches that land except the various creeks that come from the mountains.

Q. Now then are there any springs in the season, of water bubbling up from the earth?

The Court: He says he doesn't know; isn't that correct, Mr. Mountjoy?

The Witness: I said there were none to my knowledge.

The Court: Well then he knows nothing about it.

Q. Well could you see any indications?

A. None.

Q. Have you actually seen water flowing from the Wald—surface of the Wald land, into these culverts? A. Yes.

Q. Now then can you tell me approximately how much water was flowing into these culverts from the surface of the Wald land?

A. I would say six second feet.

Q. And have you seen that often, on a number of occasions? A. Yes.

Q. Now then, having in mind the character of the Wald land, the area to be irrigated, what is your opinion as to whether six acre-feet represents an unusual amount of wastage of the waters used to irrigate the land—six second feet?

A. I would say it is a large wastage. [466]

(Testimony of Wiley G. Mountjoy.)

Cross Examination

By Mr. Wallace:

Q. Do you know, Mr. Mountjoy, what portion of this six second feet of water you saw flowing through those culverts came from the Magee-Minesinger Ditch?

A. Well it all must run through some portion of the Magee-Minesinger Ditch.

Q. Could it be possible that any of it came from your canal, government canal?

A. Possibly a very small portion.

Q. You wouldn't say how much?

A. I would say less than ten percent.

Q. That is a guess on your part?

A. There have been no measurements taken.

Q. And the snow fall on the Tom Wald land up there is the same as other lands? A. Yes.

Q. And the rainfall there? A. Yes.

Q. And all of these lands of the defendants, and Tom Wald's, slope generally to the west?

A. Yes.

Q. And is it the same general run-off on all this land? A. Yes.

Witness Excused.

Mr. Smith: We have nothing further.

Interveners Rest.

The Court: Any further testimony? [467]

Mr. Simmons: Nothing.

And whereupon, at 3:15 o'clock p.m. on May 8, 1940, the testimony was closed.

The Court: Transcript of the testimony will be furnished not later than six weeks from today. The plaintiff is allowed 20 days from this date in which to prepare and serve upon the attorney for the defendants and the attorney for the interveners a brief in support of its contention here; the interveners are allowed 20 days after this date in which to prepare and serve upon the attorneys for the government and the attorney for the defendants a brief in support of its contention—in support of its complaint in intervention; the defendants are allowed 20 days after service of the plaintiff's brief upon him to prepare, serve and file a reply to the plaintiff's brief, and 20 days after the service upon him of the interveners' brief in support of their contention, within which to prepare, serve and file their reply to that brief; the interveners are allowed 20 days after the service of the government's brief upon them in which to reply thereto; each party is allowed 10 days after the service of the reply brief by opposing parties, in which to prepare, serve and file with the clerk a response to such reply brief as has been filed. Upon the filing with the clerk of a transcript of the proceedings taken during the trial of this case, and the briefs referred to, the matter will be considered as submitted to the Court, and taken under advisement. The usual order of adjournment will be made. [468]

Thereafter, on November 25, 1941, the United States filed its Notice of Appeal herein, in the words and figures following, to wit: [557]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 28, 1941.

JOHN B. TANSIL

United States Attorney for
the District of Montana

KENNETH R. L. SIMMONS

District Counsel, Office of the
Solicitor, Department of the
Interior

Attorneys for the Appellant,
The United States of America

[Endorsed]: Filed November 25, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [558]

Thereafter, on November 26th, 1941, the Interveners filed herein their Notice of Appeal which is in the words and figures following, to wit: [559]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, the interveners in the above entitled cause, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled cause on the 28th day of August, 1941, which said judgment dismissed the complaint in intervention without prejudice and granted judgment against the interveners and in favor of the defendants for the defendant's costs. This appeal is taken from the said judgment, and the whole thereof. Dated November 25, 1941.

RUSSELL E. SMITH

Attorney for Appellants,
Flathead Irrigation District
and Dennis A. Dellwo

[Endorsed]: Filed November 26, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [560]

Thereafter, on November 26th, 1941, the Interveners filed herein their Bond on Appeal in the words and figures following, to wit: [561]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents that we, the undersigned, Flathead Irrigation District, a corporation, and Dennis A. Dellwo, as principals, and Massachusetts Bonding and Insurance Company, a corporation duly qualified and authorized to execute bonds and undertakings within the State of Montana, Surety, are held and firmly bound unto the United States of America in the full sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the defendants above-named, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of November, 1941.

The condition of this obligation is such that whereas, in the District Court of the United States for the District of Montana in the above entitled action pending in said court, a judgment was rendered in favor of the defendants above-named and against the interveners above-named dismissing the complaint in intervention without prejudice, which said judgment was made and entered on the 28th day of August, 1941, and

Whereas, the interveners above-named have filed their notice of appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit, and said interveners propose to prosecute said appeal to reverse said judgment, [562]

Now therefore, in consideration of the said appeal, if the Flathead Irrigation District and Dennis A. Dellwo, interveners, shall prosecute said appeal to effect or shall pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this obligation shall be void; otherwise it shall remain in full force and effect.

FLATHEAD IRRIGATION DISTRICT

By RUSSELL E. SMITH

Its Attorneys

DENNIS A. DELLWO

By RUSSELL E. SMITH

His Attorneys

MASSACHUSETTS BONDING AND
INSURANCE COMPANY

By D. B. CAWLEY

Its Attorney in Fact

(Seal)

[Endorsed: Filed Nov. 26, 1941. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[563]

Thereafter, on December 16, 1941, the Interveners filed herein their Statement of Points on Appeal in the words and figures following, to wit: [564]

STATEMENT OF POINTS ON APPEAL

Come now the interveners and state that the points upon which they intend to reply upon appeal are as follows:

I.

Interveners will contend on appeal that the District Court erred in dismissing the complaint in intervention without prejudice, and will contend that both as a matter of law and of fact the court had jurisdiction, and that there was no absence or lack of proper parties.

II.

Interveners will contend on appeal that uncontradicted evidence discloses that the defendants and each of them took water during the period from 1935 to 1939, inclusive, in excess of

(a) the rights granted under the secretarial decree,

(b) the pro rata per acre share computed upon the entire amount of water available for all of the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project,

(c) the pro rata per acre share computed upon the entire amount of water available for all of the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project, deducting stored water,

(d) the pro rata per acre share computed upon the entire amount of water available for the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project, if only the lands originally allotted to Indians are considered,

(e) the pro rata per acre share computed upon the entire amount of water available for the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project, if only the lands originally allotted to Indians are considered and deducting stored water,

(f) the rights of the defendants upon any theory which can be advanced as to the amount of water to which the defendants were entitled.

III.

Intervenors will contend that the defendants are not entitled in the computation of the amount of water, to consider [565] stored water which is made available only by the construction of storage reservoirs and canal systems for which they have not paid and are not liable for payment.

IV.

Intervenors will contend on appeal that the defendants are not entitled to greater amounts of water per acre than are the owners of farm units, or to state it differently, that there is no difference between lands originally allotted to Indians and lands sold at the sales of surplus unallotted lands insofar as the rights to water are concerned.

V.

Intervenors will contend on appeal that the measure of the defendants' right is the measure stated in point number II (c), and in the alternative the measure stated in point number II (e), and in the alternative the measure stated in point number II (a), and in the alternative the measure stated in point number II (d), and in the alternative the measure stated in point number II (b).

VI.

Intervenors will contend on appeal that the defendants, no matter what the measure of their rights, are not entitled to take water except as the same is delivered to them by the project management of the Flathead Irrigation Project.

VII.

Intervenors will contend on appeal that the acts of the defendants in taking water without complying with the orders of the project engineer and manager are wrongful.

VIII.

Intervenors will contend on appeal that the water rights on the reservation may be exercised only under the rules and regulations promulgated by the Secretary of the Interior or his authorized agents.

IX.

Intervenors will contend on appeal that if the District Court had no jurisdiction to try the action, the District Court [566] had no jurisdiction to

make any findings of fact except those involving jurisdiction, and that the court erred in making any other or further findings of fact.

X.

Intervenors will contend on appeal that the lands of the defendants do not lie under the systems provided by the Act of Congress of May 28, 1908 (35 Stat. 448), or any of the acts amendatory thereof or supplemental thereto, and that such lands are without any rights to the waters of the reservation.

XI.

Intervenors will contend that to the extent that the Secretary of the Interior granted by the so-called secretarial decree rights to the defendants or their lands in excess of the rights of other lands on the reservation the secretary acted contrary to law.

RUSSELL E. SMITH

First National Bank Building,
Missoula, Montana,

Attorney for Intervenors.

[Endorsed]: Filed December 16, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [567]

Thereafter, on December 16th, 1941, the Intervenors filed herein their Designation of Record on Appeal in the words and figures following, to wit:

[568]

INTERVENERS' DESIGNATION OF
RECORD ON APPEAL

Interveners, in support of their appeal, hereby designate the following portions of the record, proceedings and evidence in the above entitled cause as that to be contained in the record on appeal herein:

1. Complaint as amended by stipulation.
2. Demurrer to complaint.
3. Order overruling demurrer to complaint.
4. Answer to plaintiff's complaint as amended by stipulation dated May 6, 1940.
5. Plaintiff's reply to answer to complaint.
6. Motion to intervene.
7. Objections of defendants to complaint in intervention and motion to intervene.
8. Order allowing intervention.
9. Complaint in intervention as amended by stipulation dated April 3, 1940.
10. Answer of plaintiff to complaint of interveners and reply to answer of interveners to complaint of plaintiff.
11. Motion to dismiss complaint in intervention.
12. Praecipe to dismiss complaint in intervention as to the defendants, J. A. McKeever, John Minesinger and Ada B. Minesinger.
13. Defendants' answer to complaint in intervention.
14. Interveners' reply to defendants' answer to complaint in intervention.

15. Findings of Fact, Conclusions of Law, and order of court. [569]

16. Judgment.

17. Transcript of the evidence and proceedings at the trial of the cause as filed herein, including the exhibits numbered as follows, which are designated in full: 7, 8, 9, 10, 11, 12, 13, 19, 20, 22, 35; and the following exhibits which will be certified to the Circuit Court as originals: 1, 4, 5, 3, 21; and the following exhibits which are to be abbreviated in the record and inserted at the proper place therein as follows: [The narrative statements of exhibits 2, 14, 15, 16, 18, and the statements of exhibits 23-32, 33, 34 as amended by stipulation December 26, 1941 have been inserted at the appropriate place among the exhibits in the record.]

18. Interveners' Notice of Appeal.

19. Appeal bond.

20. This designation of contents of record on appeal.

21. Statement of points on which interveners intend to rely on appeal.

Dated this 11th day of December, 1941.

RUSSELL E. SMITH

First National Bank Building,
Missoula, Montana.

Attorney for Interveners.

[Endorsed]: Filed December 16, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [570]

Thereafter, on January 9th, 1942, A stipulation amending Interveners' Designation of Record on Appeal was filed herein, in the words and figures following, to wit: [571]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto that Interveners' Designation of Record on Appeal, heretofore filed herein, may be amended in the following particulars:

1. The quoted designation of Exhibits 23 to 32, inclusive, and Exhibit 34, shall be amended to read as follows: [the narrative statement of the exhibits, as amended, has been inserted at the appropriate place among the exhibits in the record].

2. The reference to Exhibit No. 33 shall be amended by adding thereto a statement that the same was dated April 10, 1910, and that the lands therein described are Farm Units and lands not in Farm Units opened to settlement on September 1, 1910, under the Acts of Congress approved April 23, 1904 and May 29, 1908.

3. There shall be added to the designation of the record heretofore filed by the interveners the following portions of Exhibit No. 17, to-wit: Sections 1, 2, 5, 6, 7, 8, 9, 14, 15, 16, 18 and 19, and the remainder of said exhibit shall be summarized as follows:

“Exhibit 17 contains the rules promulgated by the Secretary of the Interior for the management of the Flathead Irrigation Project, as amended July 8, 1933.”

4. This stipulation shall be designated as a portion of said record on appeal, and also the order extending time with- [572] in which to file and docket the record on appeal.

Dated this 26th day of December, 1941.

JOHN B. TANSIL

United States Attorney for the
District of Montana.

KENNETH R. L. SIMMONS

District Counsel, United States
Indian Irrigation Service,
Department of the Interior.

LLOYD I. WALLACE

Attorney for Defendants.

RUSSELL E. SMITH

Attorney for Interveners.

[Endorsed]: Filed Jan. 9th, 1942. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[573]

Thereafter, on Feb. 13th, 1942, Plaintiff filed herein its Designation of Record on Appeal in the words and figures following, to wit: [574]

DESIGNATION BY UNITED STATES
OF RECORD ON APPEAL

The United States of America, an appellant in the above-entitled case, designates to be included in the record on appeal all of those parts of the record, proceedings and evidence which have heretofore

been designated by the interveners Flathead Irrigation District and Dennis A. Dellwo, and the United States also particularly designates the following items to be included in the record on appeal:

1. Complaint, as amended by stipulation filed July 18, 1939.
2. Exhibits 6 and 35 in full.
3. Notice of appeal filed by United States November 25, 1941.
4. This designation of record.
5. Statement of points on appeal filed by United States.
6. Orders extending time until February 23, 1942 for United States to file record on appeal in Circuit Court of Appeals.

JOHN B. TANSIL

United States Attorney for the
District of Montana.

[Endorsed]: Filed February 13th, 1942. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [575]

Thereafter, on Feb. 13, 1942, Plaintiff filed herein its Statement of Points on Appeal in the words and figures following, to wit: [576]

STATEMENT OF POINTS ON APPEAL
BY UNITED STATES

The United States of America, for its statement of points to be relied upon on its appeal of the

above-entitled case adopts and will rely upon the points set forth in the Statement of Points heretofore filed in this Court on behalf of the interveners Flathead Irrigation District and Dennis A. Dellwo, omitting, however, points V, X and XI therein stated.

Plaintiff will rely upon point II stated by interveners, amended, however, so that in parts (b), (c), (d), (e) thereof the word "irrigable" shall be substituted for the word "irrigated."

Plaintiff will rely upon point III stated by interveners, amended, however, to read as follows:

Plaintiff will contend that the defendants are not entitled in the computation of the amount of water, to consider stored water which is made available only by the construction of storage reservoirs and canal systems for which they have not paid.

JOHN B. TANSIL

United States Attorney for the
District of Montana

[Endorsed]: Filed February 13th, 1942. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [577]

That on December 26th, 1941, an order was duly entered herein granting Interveners additional time to file record and docket this case in the United States Circuit Court of Appeals, in the words and figures following, to wit:

[Title of District Court and Cause.]

ORDER

For good cause shown, It is hereby ordered that the interveners be, and they are hereby, granted ninety (90) days from the 25th day of November, 1941, within which to file and docket their record on appeal in the above entitled cause.

Dated this 26th day of December, 1941.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed and entered Dec. 26, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [578]

Thereafter, on December 29th, 1941, an Order granting Plaintiff additional time to file record and docket case in United States Circuit Court of Appeals was duly entered herein, in the words and figures following, to wit: [579]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING ACTION

Upon Application of the United States and for good cause shown, It Is Ordered, and this does order that the time for filing the record on appeal herein and docketing the action with the Circuit Court of Appeals of the Ninth Circuit is extended to and including the 3rd day of February, 1942.

Done and Dated, December 29, 1941.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed and entered December 29, 1941.
C. R. Garlow, Clerk, U. S. District Court, District
of Montana. [580]

Thereafter, on January 22nd, 1942, an order granting plaintiff additional time to file record and docket case in the United States Circuit Court of Appeals was duly entered herein, in the words and figures following, to wit: [581]

ORDER EXTENDING TIME FOR UNITED
STATES TO FILE RECORD IN APPEL-
LATE COURT FROM FEBRUARY 3 TO
FEBRUARY 23, 1942.

Upon Application of the United States and for good cause shown, It Is Ordered, and this does order that the time for filing the record on appeal herein and docketing the action with the Circuit Court of Appeals of the Ninth Circuit is extended to and including the 23rd day of February, 1942.

Done and Dated, January 22, 1942.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed and entered Jan. 22, 1942. C.
R. Garlow, Clerk, U. S. District Court, District of
Montana. [582]

Thereafter, on February 17th, 1942, an Order to Transmit certain Original Exhibits was duly filed and entered herein, in the words and figures following, to wit: [583]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF
ORIGINAL EXHIBITS

Upon application of R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, one of the attorneys for the United States of America, the appellant herein, and it appearing to the Court that plaintiff's Exhibits 1, 3, 4 and 5 and defendants' Exhibit 21 should, by reason of their form and contents, be sent to the appellate court in lieu of copies under Rule 75, Section (i) of the Rules of Federal Procedure;

It Is Hereby Ordered that the said original exhibits of plaintiff, Numbered 1, 3, 4 and 5, and said original exhibit of defendants, Numbered 21, be by the Clerk of this Court duly certified to the United States Circuit Court of Appeals for the Ninth Circuit and transmitted to the Clerk of said Circuit Court of Appeals by mail with the record on appeal in said cause, said exhibits to be returned to the Clerk of the Court after the final disposition of said appeal according to the practice of the Clerk of the said Circuit Court of Appeals.

Dated February 17, 1942.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed Feb. 17, 1942. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[584]

Thereafter, on Feb. 18th, 1942, a Waiver by Defendants of Further Designation of Record on Appeal was filed herein, in the words and figures following, to wit: [585]

[Title of District Court and Cause.]

WAIVER BY DEFENDANTS OF FURTHER
DESIGNATION OF RECORD

The above-named defendants, by and through their attorneys herein, state that the designations of record on appeal heretofore filed and served by the plaintiff and the interveners are satisfactory and that said defendants intend to file in this Court no other or further designation of parts of the record to be included in the record on appeal, and said defendants hereby waive the remainder of the ten days allowed by Federal Rules of Civil Procedure 75(a) for filing a designation of additional portions of the record, proceedings, and evidence to be included.

It is not intended herein to waive the right to correct the record on appeal by the means provided in Rule [586] 75(h), if it should appear that any-

thing material has been omitted from the record on appeal by error or accident or is misstated therein.

Dated Feb. 17th, 1942.

LLOYD I. WALLACE

Attorney for Defendants

[Endorsed]: Filed Feb. 18, 1942. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[587]

Thereafter, on Feb. 24, 1942, copy of order granting plaintiff additional time to file record and docket case was filed herein, in the words and figures following, to wit: [588]

United States Circuit Court of Appeals
for the Ninth Circuit

No.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, et al.,

Appellees.

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE.

Upon consideration of the application of Mr. John Tansil, United States Attorney, counsel for appellant, and good cause therefor appearing, It Is

Ordered that the time within which the transcript of record may be filed and cause docketed be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge.

Dated: San Francisco, Calif.

[Endorsed]: Order, etc. Filed Feb. 17, 1942. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Feb. 24, 1942. C. R. Garlow, Clerk. [589]

Thereafter, on Feb. 24, 1942, copy of Order granting Interveners additional time to file record and docket case was filed herein, in the words and figures following, to wit:

United States Circuit Court of Appeals
for the Ninth Circuit

No.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, et al.,

Appellee.

Upon consideration of the application of Mr. Russell Smith, counsel for the Flathead Irrigation District, Interveners, and good cause therefor appearing, It Is Ordered that the time within which

the transcript of record may be filed and cause docketed, be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT,
United States Circuit Judge.

February 18, 1942.

Dated: San Francisco, California.

[Endorsed]: Filed Feb. 18, 1942. Paul P. O'Brien,
Clerk.

[Endorsed]: Filed Feb. 24, 1942. C. R. Garlow,
Clerk. [590]

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing four (4) volumes consisting of 590 pages, numbered consecutively from 1 to 590 inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 1529, United States of America vs. B. W. Alexander, et al., designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith original exhibits Nos. 1, 3, 4, 5 and 21 in said cause.

I further certify that the costs of said transcript amount to the sum of Ninety-four Dollars (\$94.00), and have been paid by the Flathead Irrigation District and Dennis A. Dellwo, intervenors and appellants.

Witness my hand and the seal of said court at Helena, Montana, this March 20th, A. D. 1942.

[Seal]

C. R. GARLOW,

Clerk U. S. District Court,

District of Montana. [591]

[Endorsed]: No. 10095. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. B. W. Alexander, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis, J. A. McKeever, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, Appellees, and Flathead Irrigation District, a corporation, and Dennis A. Dellwo, Appellants, vs. B. W. Alexander, et al., Appellees. Transcript of Record. Upon Appeals from the Dis-

trict Court of the United States for the District of Montana.

Filed: March 23, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10095

UNITED STATES OF AMERICA,
Appellant,

vs.

ALEXANDER,
Appellee.

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE.

Upon consideration of the telegraphic application of John Tansil, United States Attorney and counsel for appellant, and good cause therefor appearing, It Is Ordered that the time within which the transcript of record may be filed and cause docketed, be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge.

Dated: San Francisco, California.

[Endorsed]: Filed Feb. 17, 1942. Paul P. O'Brien, Clerk. Refiled March 23, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE.

Upon consideration of the application of Mr. Russell Smith, counsel for the Flathead Irrigation District, Interveners, and good cause therefor appearing, It Is Ordered that the time within which the transcript of record may be filed and cause docketed, be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge.

February 18, 1942

Dated: San Francisco, California.

[Endorsed]: Filed Feb. 18, 1942. Refiled March 23, 1942. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10095

UNITED STATES OF AMERICA,

Plaintiff and Appellant,
and

FLATHEAD IRRIGATION DISTRICT, and
DENNIS A. DELLWO,

Intervenors and Appellants,

vs.

B. W. ALEXANDER, et al.,

Appellees.

AMENDED STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD FOR PRINTING.

Come now the appellants, Flathead Irrigation District and Dennis A. Dellwo, and hereby adopt as their statement of points on which they intend to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellants, Flathead Irrigation District and Dennis A. Dellwo, hereby designate for printing the entire certified transcript of the record, together with the orders of the Circuit Court extending the time of the United States and Flathead Irrigation District and Dennis A. Dellwo to docket cause and

file transcript in the United States Circuit Court of Appeals.

Dated April 4, 1942.

WALTER L. POPE

RUSSELL E. SMITH

First National Bank Building,
Missoula, Montana,

Attorneys for Appellants,
Flathead Irrigation District
and Dennis A. Dellwo.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD TO BE PRINTED BY UNITED
STATES OF AMERICA, APPELLANT.

The United States of America, appellant herein,
hereby adopts as its statement of points on appeal
the statement of points appearing in the transcript
of record on file herein.

The United States of America, appellant herein,
hereby designates for printing the entire certified
transcript of record on file with the Clerk of the
above-entitled Court.

Signed and dated at Billings, Montana, this 1st day of April, 1942.

JOHN B. TANSIL

United States Attorney, in and
for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, Department of
the Interior.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien,
Clerk.